(24,658)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 103.

DAN S. LEHON, PLAINTIFF IN ERROR,

vs.

THE CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

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1 Court of Appeals of Georgia.

Case No. 5768.

GEORGIA,
Fulton County:

Be it remembered that on the 26th day of May 1914 in the Recorder's Court of the City of Atlanta there came on to be tried before his Honor Nash R. Broyles, Recorder of the City of Atlanta, then and there presiding, the case of the City of Atlanta versus Dan S. Lehon, being a prosecution for the violation of certain municipal ordinances of said city. The said trial resulted in the said Dan S. Lehon being convicted and sentenced to pay a fine, with the alternative of imprisonment.

On the thirtieth day of May, 1914, said Dan S. Lehon presented to his Honor John T. Pendleton, Judge of the Superior Court of said County, a petition for certiorari in due and regular form seeking to review and set aside said conviction, and praying that the State's writ of certiorari issue in order that the errors complained of might be considered and corrected. A copy of said petition for certiorari is set forth hereinafter in this bill of exceptions. Upon said
2 petition for certiorari being presented to his Honor, the Judge of the Superior Court of said County, as aforesaid, and upon his considering the same, he refused to sanction the same and passed an order in the following words, to wit:

"At Chambers, Fulton Superior Court.

Upon presentation of the foregoing certiorari in due and regular form it is ordered that sanction of the same be and is hereby refused. This, May 30th, 1914.

J. T. PENDLETON,
J. S. C., A. C."

To which judgment and ruling of the Court the said Dan S. Lehon, the plaintiff in error herein, then and there excepted and now excepts and assigns the same as error, and shows that the Court, his Honor, John T. Pendleton, Judge of the Superior Court as aforesaid, erred in not sanctioning said petition for certiorari and also in not ordering the writ of certiorari to issue in order that the errors complained of might be considered and corrected.

The following is a true copy of the petition for certiorari which was presented to the Judge as aforesaid in said case:

3 GEORGIA,
Fulton County:

To the Superior Court of said County:

The petition of Dan S. Lehon shows that on the 26th day of May, 1914, in the Recorder's Court in the City of Atlanta in said county

there came on to be tried before his Honor Nash R. Broyles, Recorder of the City of Atlanta, then and there presiding, the case of the City of Atlanta versus Dan S. Lehon, being a prosecution for the violation of certain municipal ordinances of said City.

Attached hereto and marked exhibit "A" is a copy of the summons which contains a statement of the charges made against this petitioner in said Court. Upon the case being called in said Recorder's Court the defendant, through his Counsel, then and there filed a demurrer to the summons, a copy of said demurrer being hereto attached marked exhibit "B"; whereupon the City, through its Counsel, Messrs. James L. Mayson and W. D. Ellis, Jr., tendered an amendment "that the defendant is charged under sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta of 1910, with carrying on a private detective agency in said City and doing the business of a private detective without a permit therefor and
4 without being passed upon as required by said ordinances, and in that he did the business of a detective without being approved by the Chief of Police or Board of Police Commissioners as required by these sections of the City Code cited above."

Upon this amendment being made the said Recorder then and there over-ruled said demurrer.

Petitioner then, before pleading not guilty, filed his special plea in writing and under oath, a copy of said special plea being hereto attached and made a part hereof marked exhibit "C."

The City, through its counsel, moved to strike said plea and demurred to the same on the ground that the same was insufficient in law. The Court sustained the motion and demurrer and struck the plea.

Petitioner thereupon pleaded not guilty.

The City Attorney offered in evidence the testimony of petitioner delivered under oath before Judge Benjamin H. Hill, Judge of the Superior Court, in an investigation on May 14th, 1914, as follows:

Fulton Superior Court, May 4th, 1914.

No. —.

THE STATE
vs.
LEO M. FRANK.

Hon. Benj. H. Hill, Judge Presiding.

Extraordinary Motion for New Trial.

Examination of DAN S. LEHON, a witness subpœnaed by the State, on the above-stated motion, and examined before his Honor, Judge Hill, beginning at 10 o'clock A. M., May 4th, 1914, and taken down by D. O. Smith, Official Reporter.

Direct examination by Solicitor Dorsey:

Q. You are the assistant of W. J. Burns?
A. My position is that of Manager of the Southern Division of the William J. Burns National Detective Agency with headquarters in New Orleans.
Q. You have been here in Atlanta on the Frank or Mary Phagan case for how long?
A. For the past four or five weeks; I cannot recall just the date I came here.
Q. You call Mr. Burns "Governor," don't you?
A. Occasionally, yes.
Q. That is the name he is generally known by "Governor" by the operatives of the gentleman?
A. We call him Governor occasionally.
Q. How long has the governor been at work with you?
A. He came a few days before I arrived.
Q. What part of the work have you had charge of?
A. Well, the work in general.
Q. Work in general?
A. Yes.
Q. Nothing in particular?
A. Nothing in particular.
Q. You can not name any particular branch of this investigation that you have had?
A. I did everything that came to me I thought was necessary to do in the matter.
Q. Now, how are you paid for your work in connection with this Frank business?
A. It doesn't make a particle of difference to me as to my compensation. I am paid a salary by Mr. Burns and this case has absolutely no bearing on my salary.
Q. You are not interested in the retainer Mr. Burns receives?
A. I am not interested.

Q. Now, are you interested in the money Mr. Burns pays this Agency here in Atlanta?

A. I am interested the same as any other employee would be in any concern or firm.

Q. What is your interest in the money that is received from Frank or his friends and paid to Mr. Burns or the Burns Agency?

A. No interest at all personally.

Q. Mr. Lehon, have you handled any of the funds of Leo M. Frank or his friends here in this city, in connection with the investigation that has ben carried on by you?

A. I have been paid, on account of the Agency, some monies from our clients.

Q. You mean by that you have signed and receipted for
7 the monies that have been paid for the services of Burns and yourself and his agents here?

A. Yes.

Q. You have handled all of it, have you?

A. I have not.

Q. Who has handled others?

A. I don't know.

Q. Of whom did you get the money?

A. From Mr. Herbert Haas.

Q. Herbert J. Haas, of counsel for Leo M. Frank?

A. Yes.

Q. Now, at about the time Ragsdale made his affidavit how much money did you get from Haas?

A. About the time.

Q. Yes.

A. I can not recollect.

Q. Well, just approximate it?

A. I don't recollect whether or not I got any money from Haas at that time.

Q. You don't recollect whether you got any or not,—is that true?

A. Yes, sir.

Q. Immediately previous, did you get any money?

A. Yes.

Q. How much?

A. Five hundred dollars.

Q. Was it paid in cash or by check?

A. By check.

Q. Did — talk with Haas about the Ragsdale affidavit when you got this money?

A. I did not.

Q. Had you previously discussed it with him?

A. I recollect mentioning something about an affidavit
8 that was to be made by a preacher and I never knew Ragsdale's name until the day he made the affidavit.

Q. You knew your subordinates, or the subordinates of the Burns' Agency, or Burns himself had been in touch some time with a preacher?

A. I had heard there was a preacher.
Q. From whom did you hear that?
A. I heard it from one of our operatives named Whitfield.
Q. Is he the man who used to work with Pinkertons under Pierce?
A. Yes, that is the same man, I heard it from Rogers.
Q. W. W.—Boots Rogers?
A. Yes.
Q. A witness for the State?
A. Yes.
Q. Who else?
A. C. C. Tedder.
Q. Carlton C. Tedder, he was also in your employ?
A. Yes.
Q. Did you employ and pay Tedder?
A. I did.
Q. What did you pay Tedder?
The Witness: Am I obliged to answer that, your Honor?
The Court: Yes, sir.
The Witness: I advanced Tedder, at the time that I employed him, which I think was the 15th or 16th of April, a month's salary.

Q. How much was that?
9 A. Two hundred and fifty dollars.
Q. What date was this you advanced it?
A. Fifteenth or sixteenth of April, I am not sure which. I also advanced him $250. for expenses of making a trip to introduce some witnesses that he told me were living in Birmingham or Chattanooga or Nashville. One of them he told me was a prostitute in a house of prostitution at either Chattanooga or Birmingham, who he had information would swear to Frank being a pervert and I instructed him to go and get this information by all means; and he also informed me at the same time that he had a very important witness in the person of Mark Wilson, a negro, who would testify that he saw James Conley buy a lunch for Mary Rich, the negress near the pencil factory on the day of the murder and that Wilson would also state that he saw Conley going back to the pencil factory, in the alley and coming out of the Alley. He also told me there was another witness named Hodge, a negro, who could verify and support or corroborate the statement of Mark Wilson, and it was for that purpose I gave this money to Tedder to defray his expenses and he explained to me he was broke and needed money and asked me to advance him a month's salary, which I did.

Q. At the time you advanced this first $250. was the
10 preacher mentioned to you?
A. I had never heard of the preacher at that time.
Q. Do you know a man by the name of Petrie?
A. I do not.
Q. Isn't he working for the Burns' Agency?
A. If he is I don't know it, I don't know anything about him.

Q. Petrie?
A. I never heard that name before to my knowledge.
Q. Anything that sounds like that name?
A. Petrie?
Q. A kinsman of Ragsdale?
A. I never heard the name Petrie before.
Q. At the time you advanced Tedder the second $250.00, had you heard of this man Ragsdale?
A. I had not.
Q. And when was the first time that Tedder discussed Ragsdale with you?
A. I think it was on the 22 of April Tedder told me that Arthur Thurman, a lawyer here, had a preacher client of his, who claimed to know a great deal about the Frank case; that he had overheard some negroes talking in an alleyway and one of them admitted the killing of a girl in the Pencil Factory and that they were willing to make an affidavit to that effect. I told him I would be very glad to get it. That was all that was said at that time that I can recollect. And the next time, which I think was on the
11 23 of April, Tedder called me up on the telephone and said "Thurman is bringing those two men to your office, the preacher and another man, to make affidavits." I said "All right, have them bring them down." Thurman came into our office and said, "Mr. Lehon, this is Dr. Ragsdale and this is Mr. Barber" pointing to the men, "They desire to make affidavits in the Frank case." I said, "All right." And Thurmond withdrew. I asked Barber and Ragsdale to step into my private office and they were only seated a minute and I got my hat upon the rack and said, "Come on over to Mr. Rosser's office, the attorney's." I brought them to Mr. Rosser's office where they were first interrogated by Mr. Brandon, as Mr. Rosser was not present. It was during the noon hour. Later Mr. Rosser came, and in the presence of your Mr. Tipton, I think it is, the stenographer, and Ragsdale and Barber, their affidavit was taken by Mr. Rosser.
Q. Now, you took them right over, after they were brought in there by Thurman and Tedder without any investigation at all?
A. They were not brought in by Thurman and Tedder.
Q. By whom were they brought?
A. They were brought in by Mr. Thurman.
Q. I mean your man Tedder arranged and put you on
12 notice they would be brought in, and in that sense they were brought in by Tedder?
A. I explained to you, Mr. Dorsey, Tedder called me up on the telephone and stated Mr. Thurman was coming to my office with those men.
Q. You had previous knowledge of it?
A. As I have explained.
Q. You got them from Tedder.
A. I did.
Q. To what extent did you make investigation into the character and reliability of those men?

A. After Mr. Rosser had taken the affidavits of both Ragsdale and Barber and then asked them for the names of some of their associates, or some reputable men here in Atlanta, or elsewhere in the State of Georgia, that could vouch for their good characters, and both Ragsdale and Barber furnished Mr. Rosser with a number of names, mostly of Atlanta citizens, and Mr. Rosser then furnished me with a list, and I immediately instructed our operatives, and went personally to some of them myself, and interviewed two gentlemen at least in regards to Ragsdale. Those men were Mr. ——. They were connected with the State Mission Board here; one of them was a preacher named Page, and the other man was acting secretary of the State Mission Board, Bernard, I think his name is.

13 Q. B. Bernard, the auctioneer?

A. I don't know whether he is an auctioneer—no, a different man.

Q. A different man?

A. Yes, he was acting secretary of the State Mission Board in the absence of J. J. Bennett, who was sick in the hospital and whose name Mr. Ragsdale had furnished us. I called at the State Mission Board for the purpose of interviewing J. J. Bennett and found that he was sick.

Q. That is the first investigation you ever made—after the affidavit was taken?

A. That is the first time I made an investigation. That is the first time I knew Ragsdale's and Barber's names.

Q. How long before you got the affidavit, before you received the first information from Tedder this information could be obtained?

A. Repeat the question?

Q. How long previous had you first obtained the information previous to the day you actually got the affidavits, had you actual information from Tedder the affidavit could be made?

A. I think it was a day or two; not more than a day or two.

Q. Then did the Governor know anything about it?

A. When I first mentioned the matter to the Governor about a preacher being in existence who knew something of this and

14 when I mentioned he was in an alleyway he says "No more of that alley business." "We have run out enough of that," and didn't take the thing seriously at all.

Q. How long was that previous to the time that affidavit was actually executed that you and W. J. Burns had this talk?

A. I could not say exactly, but it was only a few days.

Q. It was only a few days?

A. Yes.

Q. Did you not communicate this matter immediately and directly to the Governor?

A. I don't think I did.

Q. Why did you delay?

A. Because I didn't think it was very important myself.

Q. Now, from the time Tedder first mentioned this matter to you,

Q. Did you take receipts?
A. Yes, we usually take receipts.
Q. Where are those receipts?
A. They are in our files in our office.
Q. You come in contact with Jemmie Wrenn in connection with this case?
A. I don't know anything about Jimmy Wrenn at all.
Q. You don't know him?
A. No.
Q. Or George Wrenn?
A. I don't know anything about him.
Q. Have you received any reports from your men with reference to what they had done in this case?
A. No, sir, I have not.

18 J. L. BEAVERS, sworn as a witness for the City testified as follows:

I am Chief of Police of the City of Atlanta and have held the position for the last three years. I know Dan S. Lehon, the defendant. He is in Court. I have never been requested by C. E. Sears or the Burns Agency or anybody to approve Dan S. Lehon as a detective or to carry on the business of a detective agency in the City of Atlanta, nor has any such request ever been made of me.

On cross examination he testified:

The detectives of the Police force of the City of Atlanta have done most of the getting of the testimony in the Frank case. I am in charge of the city detectives as their head. The city detectives are a part of the police force of the city of Atlanta and they have assisted the Solicitor in the prosecution of the Frank case. Mr. Langford, Chief of Detectives, Mr. Starnes, Campbell, and others have so assisted him. So far as I know no non resident has ever been approved as a detective in the city of Atlanta. I have always understood that a man had to be a resident of the city before he could get a license to operate a detective agency or to be a detective.

19 I have always understood that if a man wished to get a license to carry on a detective agency that the license had to be in the name of some one who was in the State, and that while some of the operatives of that agency may not have lived in the city at the time the license was obtained, but became residents of the city afterwards.

On redirect examination he testified:

The people who have gotten licenses, the Pinkerton people, and anybody else who have obtained licenses to do detective business in Atlanta have uniformly submitted the names of all people who wanted to operate here as detectives so far as I know, except in this case, though I understand there are several here who have been working as detectives who have not been approved by the Board of Police Commissioners or myself either. The Pinkerton people have from time to time submitted to me names for approval. Chief Jennings has that agency standing in his name and he sub-

mits the names of his operatives to the Board. The Board passed on all of them, I think some time in 1912. I do not know of my own knowledge of anybody else here who operates a detective agency and operates detectives without having them passed on except the Sears Agency.

On recross examination he testified:

Mr. Sears' application was passed up favorably by the
20 Board to carry on a detective agency. He was passed up as the agent of the W. J. Burns Detective Agency, and it was understood that it was the agency of the W. J. Burns Detective Agency, but the license was passed up in his name. He made application as a special agent for the American Bankers' Association and Burns' name was not mentioned at all, but it was understood that it was the Burns Detective Agency, and I think he so stated at the time.

On redirect examination he testified:

There were two detective agencies here at the time the Frank case came on, one was Jennings' and the other Sears'. The men Jennings worked on the Frank case were submitted to the Board and to myself. They were passed up by both the Board and myself. I don't know of my own knowledge when Burns and Lehon came to Atlanta, but from public accounts their appearing here was about the time this case was taken up after the Supreme Court had sustained the lower Court in the case. Frank was tried and found guilty about ten months ago as I now recall. At the time Mary Phagan was found dead some of the Pinkerton men worked on the case. I understand they were employed by the National Pencil Company at the start, and at the winding up of the first investigation two or three of the operatives of the Pinkerton were
21 let out of the Pinkerton agency on account of some work in this case. Frank was convicted and the sentence affirmed by the Supreme Court. I never heard of Burns or Sears, or any of the people now before the Court, especially this defendant, ever appearing in the case until after the Supreme Court had affirmed the lower court. Frank was employed as General Manager of the Pencil Factory, and the Pencil Factory, I understand, employed the Pinkerton Agency. I never heard of Mr. Burns until after the decision of the Supreme Court in the case. The first time I ever saw Mr. Lehon was about the time that Burns was about to make his report. I think it was the day he was supposed to make his report. Mr. Burns and Mr. Lehon came into my office and said they had come to pay their respects and they asked whether I cared to take up the case with them or discuss it, and I told them I did not. They said a few words and turned and walked out. Their report came out in the next day or two after that. They did not say how long they had been here before. At the time they were here there was an extraordinary motion for new trial pending on behalf of Mr. Frank.

(It was admitted by the petitioner that he had never been approved by the Chief of Police or the Police Board as a detective to operate in the City of Atlanta.)

22 ANNIE MAUDE CARTER, sworn as a witness for the City, testified:

I know Dan S. Lehon. I first met him about six weeks ago. I met him through a party named Jake Jacobs, doing business on Decatur Street. Mr. Jacobs told me he wanted me to meet Mr. Burns and finally persuaded me to go to the office of Mr. Haas in the Fourth National Bank Building. Mr. Lehon was there and that was the first time I ever saw him. There were present in Mr. Haas' office Mr. Burns, Mr. Lehon and four or five other men and a crowd of Jews. Mr. Lehon and another man named Dr. White carried me from Atlanta to Union City and I went on to New Orleans. I got the wai-t I have on in New Orleans and the hat in Chicago. Mr. Lehon gave me four dollars the day I got back from Chicago in the Sheriff's office and gave me a silver dollar in the tower. He gave me five dollars in New Orleans. A colored operator bought the tickets I went on to Chicago.

On cross examination she testified:

I don't know whether Mr. Lehon was in the Fourth National Bank Building at the time I got there or not. I don't know Mr. Rosser nor Mr. Arnold and I don't know whether they were in there or not. I saw Mr. Lehon in New Orleans. I left him in Union City. Mr. Lehon told me not to use my name, but
23 to use my husband's name while I was in the Frank case. They wanted me to give some information about Conley, who was a witness in the case. They wanted me to tell them what I knew about him.

LEONARD HAAS, sworn as a witness for the defendant, testified:

Mr. Herbert Haas and myself employed Wm J. Burns and one of the employments that he was designated to do was to check up the methods used by the police and detective force of the city of Atlanta against Leo M. Frank. We stated to Mr. Burns that we thought a number of police officers had used illegal methods in obtaining testimony and intimidated witnesses and we wished that thoroughly sifted and gone into.

Cross-examination:

We employed Mr. Burns as detective, and he and his other people were popularly known as detectives. My understanding is that Mr. Lehon was the Manager of the Southern Agency and I don't think he was employed as a detective. We employed Mr. Burns and Mr. Lehon came on as an employee and not as a detective. As to whether he worked as a detective. As to believing that the detectives had used improper methods and the facts before us, I can state
24 that there were several; the incarceration of Minola McKnight until she had retracted a previous sworn statement. My information is that she was incarcerated in the city prison a day and night. I had a number of cases of improper treatment that I gave to Mr. Burns; the incarceration of Albert McKnight until he had retracted. It is reported that he came to the jail voluntarily.

Also a number of girls who had sworn against Frank's character had told us of the improper methods used to make them swear falsely, I recall Majori McCord and Dewey Hewell, and a number of other girls whom I don't recollect just at this time. We gave all those names to Mr. Burns and told him the details of the things we had heard and that we wanted an i-vestigation, especially as to the activities of the city police in the matter of these retractions of Minola McKnight and as to the statement that had been made to me by Harry Scott of the Pinkerton Detective Agency to the effect that they would not let him go to see Conley after he made his last statement and that he had requested Chief Beavers to let him go and see Conley and that Chief Beavers told him he could not, that he did not want to see anybody and if he did he would send for them. That was some of the things Mr. Scott had told me. I don't remember all of them. At the time of this employment a motion for
25 new trial was pending which was not the original motion, but was an extraordinary motion. A number of the affidavits used on the extraordinary motion had already been secured at the time Mr. Burns came to the city, and a number of them were secured subsequently. Annie Maud Carter made an affidavit after the motion was filed. There were approximately two hundred and fifte en affidavits filed by the defense and approximately that number filed by the State. I don't remember which of these were obtained prior to the time Mr. Burns was employed and which were obtained subsequently. I did not pay Mr. Lehon any money. Mr. Herbert Haas made all the payments. I do not know of any payments made to Lehon, Mr. Herbert Haas has charge of all that.

C. E. Sears, sworn as a witness for the defendant, testified:

I am the local manager of the Burns Detective Agency, that is, local manager of the Atlantic Branch. This is my license where I registered with the City and County and State for the business of carrying on a detective agency. At the time my license was granted I let the Police Commission know that I was applying for it as agent of Wm. J. Burns. Some questions were asked me by some
26 members of the Board and I stated to them that Mr. Burns was the head of the agency. I know Dan S. Lehon. He resides in New Orleans, is a citizen of Louisiana and of the United States. He was working for Mr. Burns on what is known as the Mary Phagan or Leo M. Frank case. He had charge of the men as manager of the third division, that is, the Southern division located at New Orleans. His work is that of an official of the agency. He does office work. Personally I do not know of any work he has done on the outside. I don't know personally any more than that he advised and gave directions. He gives directions to the men the same as Mr. Burns. You might say that he is a collector of information between the men who actually do the work and Mr. Burns, who finally gives direction.

On Cross Examination he testified:

On cross examination the witness identified his application after it was introduced in evidence.

As to the report made by Johnson, Fain and White as a Committee on March 6th, 1913, on which my license was based, I remember that the Committee made a report but I don't know what it was. Mr. Lehon came here some time in March this year (Petitioner admitted that it was about the same time the extraordinary motion for
27 new trial was filed, perhaps a little before or a little after, but about that time.) He came here to assist Mr. Burns in the Phagan case and is serving under Mr. Burns in what you might call detective work. He is here yet. He is here now; has been on the case all the time. His name has never been reported by me to the Police Commission as a detective. Mr. Lehon was not under my instructions. He did not work under me. I had nothing to do with employing him. I had no control over him except to the extent that he worked under the protection of my license. I don't think it was necessary to have had him passed on by the Police Board in order for him to work under my license.

Q. You agreed to do that didn't you when you obtained your license?

A. I don't consider Mr. Burns and Mr. Lehon operatives; they were not working under me.

Q. Your license then could not cover them if they were not working under you?

A. I don't know whether it could or not, that is the point to be decided.

On Re-direct examination he testified:

I don't know of any work done by Mr. Lehon as detective. At present he is here in the city as a witness before the Grand
28 Jury, and was here to answer to a rule before Judge Hill in the Frank case until he was discharged from that rule this morning.

The witness here testified that in this case, where Mr. Lehon was employed to investigate the methods by which certain evidence had been obtained for the prosecution in the Frank case by the police he would have been unable to accomplish anything in his investigation if he had been required to work under police supervision and to report to the police.

To this evidence counsel for the city objected on the ground that it did not appear that he was employed, and next, that it was not a matter of opinion of this witness whether he could or could not do it, and he was not qualified as an expert.

The witness then testified that he had been manager of this agency about two years and had not been engaged in a detective agency previously.

The Court did not sustain the objection to this testimony and thereupon counsel for petitioner asked the following question:

Q. In your opinion state whether Mr. Lehon, he being employed to investigate the methods employed by the police of this city in securing evidence against Mr. Leo M. Frank, if he had been re-

quired to work under police supervision and with his iden-
29 tity and activities known to the police, could he have accomplished anything by any attempted investigation under such circumstances?

Counsel for the city objected to the testimony.

Counsel for petitioner stated that the answer anticipated of the witness was that in the opinion of the witness Lehon could not have successfully investigated and could not have accomplished anything under such conditions.

The Court sustained the objection and ruled out the testimony.

Thereupon the witness was further allowed to testify that in the investigation of a case by detectives secrecy of operation as to the person you are operating against or the person whose activities you are investigating is absolutely necessary to successful detective work.

On recross examination he testified:

The list of persons (being the list hereinafter set forth as being the list reported to the Chief of Police) is one of the lists which I furnished to the Chief of Police. I have furnished others. I have sent several separate names. When application was made for my permit to conduct this agency I stated that one of the prin-
30 cipal purposes was to protect bankers in this territory, and that is still the principal client of our agency.

Q. That was about all the purpose you had in this application and you state in substance that it having been decided to open an office and put a force of trained detectives in this territory with Atlanta as headquarters and you desired to open an office and stated you would comply with every legal requirement and you say this application is made to your Honorable Body as aforesaid, it being understood and agreed if the same is granted all business will be conducted as required by the Board and that no strike or divorce business will be handled by your agency. And as a guarantee of this you gave them a list of endorsements. Now on that application this report was made and license was granted with the express understanding that your agency would handle nothing but bank business and that was agreed to by Mr. Felder, attorney for Mr. Sears. That was agreed to by you and your attorney?

A. It was not agreed to by me. I was not present when this report was made. I was not present when Mr. Felder was there and agreed to it. I don't recollect that he went before the Police
31 Committee. I was before the Committee once or twice. He appeared before the police committee when the license was granted and appeared before the Board when I was not present. I did not agree that the name of every person worked by the agency would be presented to and approved by the Board; I have no recollection of that. I don't know whether under the report of the Board of Police Commissioners it was granted on those conditions or not. I was not there when the license was finally passed on, I was not present.

Petitioner then introduced in evidence the licenses and tax re-

receipts hereto attached, marked exhibits D, E and F, and made a part hereof, with the usual prayer for reference.

Petitioner himself then took the stand and his counsel stated to the Court that petitioner was willing to be submitted to full examination by the Court and by Counsel for the City as to any matter relevant to the issue, and that he waived any privilege of not being compelled to answer on the ground that he was the defendant on trial. Petitioner then stated as follows in response to the questions as to what he had done in connection with his employment. The following is a complete report of the examination and cross-examination of petitioner:

32 Q. Go ahead and state just what you did and all about it?
A. On April 9th I, in company with J. O. Knight, called upon Miss Marie Karst, residing at 195 Kelly Street. We had a copy of an affidavit that had been formerly taken by C. W. Burke. This affidavit was read to Miss Karst and she readily signed it, after being sworn. And on the same day I called upon Miss Helen Ferguson, employed at the Hamilton-Carhart Factory, 75 South Pryor Street, I, in company with Mr. Knight. He had a copy of an affidavit that had been taken prior to that date, as I recollect by C. W. Burke, in connection with the Leo M. Frank case, and Mr. Knight read the affidavit to Miss Ferguson and she turned to me and said that her mother told her not to sign any more papers. I then told her that her mother gave her very good advice and I would not allow her to sign the paper then if she wished to. I then asked her for her address and she gave it to me and on that night I called on her at her home, Mr. Knight being present and she signed this affidavit in the presence of her father, mother, and younger sister. On the same day, April 9th, that same night, I called upon Miss Ruth Robertson who had a similar affidavit. I believe I have
33 her address here, 74 Walton Street. I think she lived on Capitol Ave. or Capitol Street close to the Capitol then. I recollect Mr. Knight read this affidavit to Miss Robertson in the vestibule of the porch and she was sworn, to the best of my recollection. I know she readily signed it and said every word of it was true. On April 10th, I, in company with Mr. Knight met a man named J. E. Duffey who made an affidavit formerly in connection with the Frank case to C. W. Burke, and after the affidavit was read to him by Mr. Knight he said the same was true and readily signed it. On April 13th, I called with Mr. Dan MacIntire, Jr., a notary, on Miss Mamie Edwards, nee Kitchens, at her home 19 Clifton Street. She had made an affidavit for Mr. C. W. Burke in connection with the Frank case some time prior to that and we had a copy of same and Mr. McIntire read it to her and she said there were some little corrections that should be made that were not in the affidavit, and I suggested to Mr. McIntire that he write down with pencil whatever was omitted from the old affidavit, which was done in my presence, and Miss Edwards then willingly and readily signed the affidavit in the presence of her mother. On April 14th,

in company with Mr. Dan McIntire, I talked with Albert McKnight,
a negro. A similar affidavit was shown him. He said it was
34 true and was anxious to sign it. I noticed though that he
had changed address and place of employment and I said that it should be corrected before he signed it. This was done and on the following day, April 15th, in company with Mr. McIntire, I called at the Terminal Station, where we talked with Albert McKnight, who was employed there, I think in the Cafe department, and after the affidavit was read to him by Mr. McIntire, he said it was all true, and if my recollection is correct he said he was glad to get the chance to do so; that he did Leo M. Frank an injustice at the time of the trial by swearing falsely. He signed the affidavit in my presence after making that statement. On April 23, in company with Mr. Dan McIntire I called on Mr. A. W. Wheelus, A. S. Jones, and Mr. A. O. Lyndon in connection with the R. L. Barber matter. Barber had made an affidavit on that day for Mr. Luther Rosser and Mr. Brandon and myself and after making same Mr. Rosser asked him for the names of some of his associates of reputable men who could testify as to his good character and whether or not they would believe him on oath in a court of justice. These men readily signed this affidavit, stating that they
knew Barber for a number of years and would believe him
35 under oath in a court of justice and knew nothing derogatory to his character. On the same day, April 23d, I called on Mr. H. R. Bernard, who was acting secretary for the State Mission Board, in connection with the Ragsdale matter and he readily signed an affidavit, stating he had known Mr. Ragsdale for a number of years and he knew him to be a reputable man and knew nothing at all derogatory to his character and he would believe him under oath in a court of justice; and at the same place, the State Mission Board, Dr. Spencer B. King made a similar affidavit regarding Ragsdale.

Q. Go ahead and state to the court just what you did and what your position is and all about it?

A. I hold a position of manager of the Southern Division for William J. Burns National Detective Agency, with headquarters at New Orleans, I think it was the 24 or 25 of March I came here at the request of Mr. William J. Burns to assist him in this investigation.

Q. What was the nature of the assistance you gave, just go ahead and state that?

A. The most of my work consisted in instructing the operatives and hearing reports from them and verifying the work that had already been done by others in connection with our agency, for
instance, interviewing these witnesses that I have just
36 furnished you the names of with the disinterested notary public.

Q. The evidence that had previously been furnished by other people not connected with the Burns Agency?

A. They had no connection with the Burns Agency.

Q. Did you conceal your identity to any of those?
A. I never did conceal my identity at any time since I have been in Atlanta, but every person I talked with I either gave them my card or gave them my name and stated what my mission was and why I came to interview them.
Q. You were really assisting the defendant's counsel in the preparation of the case?
A. That is my principal duty.

Cross-examination by Mr. Mayson:

Q. Mr. Lehon, what is your profession, your business and occupation?
A. I am manager of the William J. Burns International Detective Agency in New Orleans, in charge of the Southern Division.
Q. Is your occupation that of detective.
A. No, I would not consider it that.
Q. You are not a detective?
A. No.
Q. You do detective work?
A. I manage a detective agency.
37 Q. Did you do any detective work in Atlanta?
A. I don't consider that I have.
Q. You did see a number of witnesses in behalf of the Frank counsel?
A. I have, yes, sir.
Q. You called to see them to see if they would not change the evidence they had formerly given?
A. No, sir, I did not.
Q. They signed statements?
A. They signed statements.
Q. Who prepared the statements?
A. I could not say that of my own knowledge.
Q. How long were you engaged in that work?
A. For perhaps three or four weeks.
Q. Who employed you, Mr. Lehon?
A. Mr. William J. Burns.
Q. Did you receive any payments here from anybody for your services while you were here?
A. I received monies on account of our services from our clients.
Q. Sir?
A. I received monies from our clients on account of services rendered by William J. Burns.
Q. That was for detective work wasn't it?
A. For making investigations in connection with that case.
Q. That was for work that you had done?
A. Not particularly that I had done.
38 Q. Part of it you had done.
A. I presume so.
Q. What?
A. I presume so.

Q. Mr. Lehon, you never made any application here yourself, for permit to do business, to do detective work for the agency?

A. I never have.

Q. You did not ask the police board or police chief to approve your working as a detective?

A. No, sir, I did not.

Q. Did you have a talk with one Mary Rich about her affidavit?

A. I was present when Dr. Marx and Mrs. Leo M. Frank were talking to Mary Rich.

Q. Whereabouts?

A. Down near the Pencil Factory.

Q. In the factory or on the street?

A. On the street.

Q. What time of day?

A. I think it was around noon some time, perhaps one o'clock or 1:30.

Q. Did you go by appointment or meet her accidentally?

A. No I understood from some one that Dr. Marx and Mrs. Frank were going down there to talk with her.

Q. Was she working in the factory at that time?

A. No sir, she sold lunches on the street, she is an old negro woman.

Q. You understood there had been an appointment made for you to talk with her?

A. Not for me to talk with her.

39 Q. For what purpose?

A. Not for me to talk with her.

Q. For what purpose?

A. For Mr. Marx to talk with her.

Q. Why did you go?

A. Simply to hear what was said.

Q. What use were you going to make of it if you were not concerned in it in any way?

A. I don't know what use was to be made of it, I know Dr. Marx and Mrs. Frank simply asked her to tell the truth as to what she knew.

Q. You went there in the capacity of an experienced detective?

A. No sir, I did not.

Q. Didn't you go there in the capacity of your employment as a member of the Burns Detective Agency?

A. Yes, I went there in that employment.

Q. Do you know A. O. Lyndon?

A. I think I interviewed a man by that name.

Q. You interviewed him about the Ragsdale statement; the Ragsdale affidavit?

A. Yes.

Q. And you interviewed J. P. Tippett?

A. I naver heard of him.

(Mr. Haas: He is Mr. Rosser's stenographer.)

Q. Do you know Maggie Nash?
40 A. I never interviewed her to my knowledge.
Q. You never interviewed her?
A. I never interviewed a woman by that name as I recollect. I will know her if I ever see her, but I don't recollect her by that name.

Mr. Mayson: Bring her here and see if she can identify this man.

(The woman was brought in. This is Maggie Nash. (Addressing Mrs. Nash:) Do you know this gentleman over there (indicating Mr. Lehon)?

A. No sir.
Q. Did he come to see you, Mrs. Nash, about the Frank case?
A. No sir.
Q. He did not?
A. No

Mr. Mayson: That is all.

By Judge Powell:

Q. Just state whether you acted in good faith in doing what you did?

A. The question of being approved by the Police Board or Chief of Police of Chief of Detectives, that never occurred to me at all. I never heard it discussed, Judge, until this matter came up, as to whether I had any right to work here or not. I took it for granted however that Chief Beavers and Chief Langford knew we were here. Announcement of our coming was made in the newspapers.
41 I recollect reading one article whether the Chief was quoted correctly or not, I know, to the effect he welcomed us here, Mr. Burns and myself, and stated he would gladly co-operate with us. I acted in good faith and can assure you I meant no discourtesy to the police officers or police force.

Q. What about your ability to work under police supervision and do the work you were engaged in could it have been done under police supervision effectively for your client?

A. No, sir, it could not.

Q. Could you have made your investigation under police supervision?

A. We could not.

Q. Could you have done your work effectively for your client, Leo M. Frank?

A. No, sir, it would have been impossible.
Q. You were representing the defense in that case?
A. Yes, sir.
Q. The police were prosecuting him?
A. So I understood.

The following testimony which had been taken of the Police Commissioners of the City of Atlanta was also by consent, introduced in evidence in this case.

W. P. FAIN testified that he had been a member of the Police Commission and was Chairman of the Committee on applications for detective agencies and remembered the application made by
42 Sears. The Board will not grant a license to a non resident and that was why the license was taken in Sears' name. I understand that the city code prevents a non-resident from holding a license and it is the practice of the Board not to grant licenses to non residents.

On cross-examination he testified:
There is no regular rule on it but it was always understood we would not grant a license to a non resident. When it comes up we enforce that construction, but we have no rule which compels us to do it. We have no written rule on the subject, we merely construe or consider that the city law forbids it.

BEN LEE SMITH, another commissioner, testified:
That he had heard Mr. Fain's testimony and that his testimony accorded therewith; that he considered that under the State law the Board could not grant licenses to anybody except residents of the State of Georgia, and that he supposed that was the idea of the entire Board, that he had been on the Board about five years and that that had been the practice and rule of the Board ever since he had been on the Board; that there was no written rule on the subject but that that was the practice. I don't remember that we have had any applications from non residents, but my construction
43 of the State law was that we could not grant a license to a non resident. I remember when the matter first came up it was decided that we could not grant a license to a foreign name. The Pinkerton Agency made an application and the license was finally granted to Captain Jennings, and that was because of our rule of not granting a license to non residents; that is, it was not a rule, it was a State law. It was the ruling of the Police Commissioners that any man not a resident of the city of Atlanta was not eligible to operate a private detective agency.

C. R. GARNER, another commissioner, swore:
That he had heard the testimony of Mr. Fain and Mr. Smith and his understanding of the matter was the same as theirs.

W. A. VERNOY, another member of the commission, testified:
That he had heard the testimony of Messrs. Fain, Smith and Garner and that his understanding of the rules of the Police Commission was the same as theirs; that while they have no fixed rule as to the granting of these licenses they understood that they would not be granted to non residents and it was their understanding that they could not grant a license to a non resident; we pass on
44 it when it comes up; we may act to-day and change to-morrow; I mean we have no written rule on the subject.

A. R. KING, another member of the Police Commission, testified: That he had been on the Police Commission for eighteen months and his understanding was the same as that of Messrs, Fain, Smith, Garner and Vernoy.

R. C. CLARK, another member of the Police Commission, testified: That he had been a Police Commissioner for a little over three years and that his understanding was that before any one could have a license to become a detective in the city of Atlanta he had to be a citizen for a year or more and that was his understanding of the construction of the Board of Police Commissioners; that they would not grant licenses to any one except residents of the city.

R. T. PACE, another member of the Police Commission, testified: That because of the short time he had been on the Board he did not know what the rule of the Board was.

Dr. A. H. BASKIN, another member of the Police Commission, testified

45 That he had been on the Board only two weeks and did not know what the rule of the Board was.

GEO. E. JOHNSON, another member of the Police Commission, testified:

That he had been a member of the Police Commission for nineteen years and that his understanding was that before any person could obtain a license as a detective and before any permit could be granted by the Board he had to be a resident; that was the rule, with the understanding that all employees should be passed upon by the Board. I don't think we have ever licensed a non resident. I think the Pinkertons made application and we turned them down on that proposition and then granted a license for them to Captain Jennings. When W. J. Burns made application we granted a license to Mr. Sears with the understanding that we would pass on all applications of the men he would work. It was granted to Sears as agent of W. J. Burns. Sears was a resident of Atlanta and agent for Burns.

The Pinkertons never filed application themselves, but the license was granted to Jennings. That was the procedure, to grant the license to a resident, and the license was granted to Sears as agent for Burns. Each application was passed on by the Board of

46 Police Commissioners and the Chief. We did not have a chance to pass on the Burns Detective Agency directly, but did pass on Sears. Lehon, the defendant, did not apply for a permit and was never recommended by the Board to Council for license, nor did the Board ever approve him as a detective under anybody else. He has never been up before the Board for approval.

J. L. BEAVERS, witness for the City, recalled, testified:

I don't remember any other list of operatives submitted by the Sears Agency except the one submitted here. (Afterwards shown in evidence by this petitioner.) I have a typewritten list and added certain names to it from time to time. The list here is marked "Revised List." I think this is a complete list. (The list itself was offered in evidence and a copy of the same is hereto attached marked exhibit "G.") I was present at the time the report came in on Mr. Sears' application on March 5th, 1912, signed by Commissioners Johnson, Fain and White, Special Committee. I think I was present. Mr. Felder was there as their attorney. I will not swear positively but I think Sears was there; he had been there *there*
before that. The memorandum attached there was made by
47 either Mr. February or Mr. Morris or somebody who took down the statement. As to Mr. Johnson's remark to Mr. Sears about Mr. Felder agreeing about the detectives; they agreed to all the demands of the committee and said they were willing to comply with everything he asked them about.

GEORGE E. JOHNSON, recalled, testified:

I signed that report. (The report is attached hereto marked exhibit "H" and made a part hereof, the same having been introduced in evidence.) This was made on the application of C. E. Sears. Mr. Sears, or his attorney, Mr. Felder, agreed to it. I don't remember whether Mr. Sears was present or not. I remember turning to Mr. Felder and saying Mr. Sears here says he will have half a dozen detectives and he agreed to have them all passed on.

The application, etc., of C. E. Sears was introduced in evidence by the city, copy of the same being hereto attached marked exhibit "I."

This was all the evidence.

Whereupon the Recorder announced his judgment finding petitioner guilty and entering up fine of one hundred dollars or thirty days in jail and binding him over to the State Court for a violation of sections 337 and 338 of the Penal Code of the State of
48 Georgia of 1910, and judgment was accordingly entered.

Said judgment and conviction was therefore adverse to your petitioner and he is dissatisfied therewith, and now within the time required by law, to wit, on this the thirtieth day of May 1914, and having complied with all the requirements of law in such cases, and having given the bond prescribed by the Act approved on December 10th, 1902, relating to certiorari to correct the judgment of Recorders' Courts, etc., found in Georgia Laws 1902 page 105; the same having been duly approved by the Clerk of said Court, and also having given bond as prescribed in sections 5192 of the Civil Code of the State of Georgia of 1910, both of said bonds having been in the sum fixed by the Recorder, and approved and attested by the Clerk of said Court, and having complied with all the other requirements of law in such cases comes now and presents this pe-

tition for writ of certiorari in which he here and now plainly, fully and distinctly proceeds to state the nature of said cause, what occurred on the trial and the errors complained of.

Petitioner complains of the following errors committed by the said Recorder in the course of the said hearing and trial:

First. Petitioner avers that the Court erred in overruling
49 the demurrer to the summons and statement of charges against him, a copy of said demurrer being hereto attached marked exhibit "B," and a copy of said summons and statement of charges being hereto attached marked exhibit "A."

Second. Petitioner avers that the Court erred in sustaining the oral demurrer and motion of the counsel for the city to strike the special plea filed in said case, copy of said special plea being hereto attached marked exhibit "C," on the ground then and there asserted by said counsel for the city that the same was insufficient in law, and says that said Recorder erred in not sustaining said plea and in not overruling the demurrer thereto and the motion to strike the same as to each and every ground and defense in said plea asserted.

Third. Because the Court erred in finding petitioner guilty:

(*a*) Because said finding is contrary to law,

(*b*) Because said finding is contrary to the evidence in said case, and

(*c*) Because said finding is without evidence to support it.

Fourth. Petitioner avers that the Court erred in the fol-
50 lowing ruling on the testimony: When C. E. Sears was testifying as a witness, and after he had testified that he was a detective by profession and had been manager of a detective agency for two years and was asked by counsel for petitioner the question: "In your opinion state whether Mr. Lehon (the petitioner), he being employed to investigate the methods employed by the police of this city in securing evidence against Mr. Leo M. Frank, if he had been required to work under police supervision and with his identity and activities known to the police, could have accomplished anything by any attempted *investigated* under such circumstances" and counsel for petitioner having stated that he anticipated the witness to answer that in his opinion Lehon could not have successfully investigated and could not have accomplished anything under such conditions; the court *sustaining* the objection of counsel for the City (no ground of objection being given at the time) and *ruling* out the answer.

Fifth. Petitioner avers that the Court erred in the following ruling: When the application of C. E. Sears for permit to conduct a detective agency (the document hereto attached marked exhibit "I") was offered in evidence petitioner objected to the same on the
51 ground that it was irrelevant and was, as to him, hearsay and matters transacted between other persons, and the Court overruled the objection and admitted the evidence.

Sixth. Petitioner avers that the Court also erred in the following respects: When the report of the special committee of the Police Commission, copy of which is attached hereto marked exhibit "H,"

was offered in evidence by counsel for the city, the petitioner then and there objected to the same on the ground that the same was irrelevant and was hearsay, and was not a matter to which he was a party. The objection was overruled and the evidence admitted.

Seventh. Petitioner further says that the Court erred in finding him guilty, because it appeared from the evidence that he was a citizen of the State of Louisiana and of the United States and was, under the first paragraph of the second section of article four of the Constitution of the United States entitled to all the privileges and immunities of the citizens of the State of Georgia while he was acting in the State of Georgia, and it appears from the evidence that by reason of the ordinances under which he was prosecuted and convicted, taken in connection with the uniform rule, practice
52 and construction which the Board of Police Commissioners of the city of Atlanta and the Chief of Police of the City of Atlanta had given as to their powers, he was precluded from being licensed or given a permit to carry on the business of a private detective or a pricate detective agency in the city of Atlanta, notwithstanding that privilege was conferred upon citizens of the State of Georgia, and because — the effect of the attitude, practice and ruling and construction of their powers by said Police Commission as testified to above, and the existence of said ordinances and the punishment they inflict, petitioner, by being found guilty of violating said ordinances, was thereby deprived of the privilege of acting as a private detective and carrying on the business of a private detective agency in the city of Atlanta in the State of Georgia, so that the effect thereof was to abridge his privileges and immunities as a citizen of the United States and to deny to him the equal protection of the law, in violation of the first paragraph of section 2 of article four of the Constitution of the United States, which provides "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and also in viola-
53 tion of the Fourteenth Amendment to the Constitution of the United States (as codified in section 6700 of the Civil Code of the State of Georgia of 1910) which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the law." Petitioner says that the effect of said finding and of said sentence was to enforce a law abridging his privileges and immunities as a citizen of the United States, and to deny to him the equal protection of the laws and to deprive him of privileges and immunities which citizens of the State of Georgia were accorded, in violation of the Constitutional guaranties set forth above.

Eighth. Petitioner further avers that the Court erred in convicting him and in fining him, for that the ordinances of the City of Atlanta under which he was tried and convicted are wholly null and void.

(A true copy of the ordinances of the City of Atlanta on this subject are attached to the special plea which this petitioner filed,

and are therefore contained in the record, and for the sake of convenience and brevity are not repeated here, but reference to the same is prayed as often as may be necessary for an understanding of the errors herein complained of.)

54 Ninth. Petitioner says that said ordinances are void:

(*a*) Because no power has been given to the city of Atlanta nor to its governing body to enact them and because they were beyond the power of the city of Atlanta and its governing body to enact.

(*b*) Because the Legislature of the State of Georgia has dealt with the subject matter of said ordinances and has made the matter inhibited in said ordinances a crime under the laws of the State of Georgia, to wit, sections 337 and 338 of the Penal Code of the State of Georgia.

(*c*) Also because said ordinances are unreasonable and therefore void.

(*d*) Also because they enact a scheme of legislation which is unreasonable and void.

(*e*) Because said ordinances, and each of them are violative of and repugnant to paragraph three of section one of article one of the Constitution of this State, which provides that no person shall be deprived of life, liberty or property except by due process of law; repugnant to and contrary to the Fourteenth Amendment to the Constitution of the United States, which provides that

55 "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens in that State, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

(*f*) Also, violative of and repugnant to paragraph two of section one of article one of the Constitution of this State, which provides that "Protection to person and property is the paramount duty of government and shall be impartial and complete."

In the special plea which was offered by this petitioner at the trial, and which is made a part of this petition, being hereto attached as a part of this petition and marked exhibit "C" this petitioner has set forth particularly the reasons why said ordinances, and each of them, are illegal, unreasonable, void, and repugnant to the several clauses of the Constitution of this State and of the United States referred to above and referred to in said special plea. To prevent duplication and repetition this petitioner does not set forth again these matters, which are already made a part of this petition, but prays consideration of the same in connection with this assignment of error, and to that end prays reference to

56 these various reasons and elaborations as set forth in said special plea, just as if the same were set forth in full at this place in the petition. However, for the sake of emphasis, petitioner again reiterates that as applied to the transactions for which he was convicted said ordinances are unreasonable and are violative of those provisions of the Constitution of the State of Georgia and of the United States which are set forth above, for that said ordi-

nances require, as a condition to one carrying on the occupation of a detective or of a detective agency in the city of Atlanta that he should first obtain permission from the Board of Police Commissioners and from the Chief of Police and should work under police supervision in said city and if engaging in the business of carrying on a detective agency, should not send out or employ for detective work any person whose character and proficiency has not been approved by the Board of Police Commissioners and the Chief of Police and a certificate to that effect lodged with said detective agency, and it appears that in the transaction for which this petitioner stands convicted he was employed and his activities exerted solely in behalf of the defendant in a criminal case who was being prosecuted by the Chief of Police and police force of said city
57 under said Chief of Police and in which it was deemed necessary for his defense that the activities of the police and of the Chief of Police alleged to be criminal should be investigated, and which he was employed to investigate, and that to require this petitioner, as a condition to accepting such employment, and performing such service, to obtain the consent of and work under the supervision of the Chief of Police, who was the head of the Department whose very alleged illegal activities he was employed to investigate and to thwart, if possible, and who was prosecuting the very case in the defense of which he was assisting, and to require him to work under the supervision of the police, and to require him, so far as he may be said to have been conducting a detective agency, to have the character and proficiency of each operative sent out to work approved by said Chief of Police, thereby disclosing the identity of the operatives to the Chief of Police, was utterly unreasonable, was to deprive him of the property right which he had in the carrying on of a lawful occupation of being a detective or of carrying on a detective agency, without due process of law, in violation of those Constitutional provisions relating to that subject quoted above, and the same was also unreasonable
58 because the effect of the same was to take away from Leo M. Frank, on whose behalf petitioner was employed, the equal protection of the laws, and to deprive him of that impartial and complete protection to persons which is declared by paragraphs two of section one of article one of the Constitution of this State to be the paramount duty of Government, and because the right thus guaranteed to Leo M. Frank to be allowed to employ detectives to work in his defense and to investigate the alleged illegal methods charged against the Police who were prosecuting him, without the detectives and operatives who were doing the work being disclosed to the Chief of Police or otherwise publicly, and without their being required to work under police supervision, carried with it as a necessary corollary the right of this petitioner to accept the employment, and to make restrictions upon it of the character above illegal and repugnant to the Constitutional provisions mentioned above, and because the right to carry on the business of a detective or of a detective agency and to be engaged in the defense of persons charged with crime and to be engaged

in investigations of alleged illegal activities of the police themselves, including the Chief of Police, is a valuable property right which the State, by the provisions of the Fourteenth Amendment
59 to the Constitution of the United States, which has been quoted above, has no power to deprive him of otherwise than by due process of law, and because the effect of said ordinances and the enforcement thereof is to deprive him of these very rights.

For all of these reasons this petitioner now says that said ordinances are wholly void and the enforcement thereof illegal; that the Recorder's Court erred in enforcing them and in finding this petitioner guilty of violating them and in sentencing him to fine or imprisonment for violating them.

Wherefore, in order that said errors, and each of them may be reviewed and corrected, petitioner prays that the State's writ of certiorari may be issued directed to Honorable Nash R. Broyles, Recorder of the City of Atlanta, who presided at said trial, requiring him to certify and send up the proceedings in said case to the next term of the Superior Court of said County, that his judgment, ruling and decisions may be considered and the errors complained of corrected, and that such judgment may be rendered by this Court as may seem to be in accordance with law.

LITTLE, POWELL, HOOPER & GOLDSTEIN,
Petitioner's Attorneys.

60 EXHIBIT "A."

To the Marshal and Deputy Marshal of the City of Atlanta:
To Dan S. Lehon, Greeting:

You are hereby commanded, to be and appear at the Municipal Court of the City of Atlanta to be held in the Recorder's Court Room at 8:30 o'clock A. M. on the 26 day of May 1914, to answer the charge of violating sections 2024, 2025 & 2026 of City Code of Atlanta, Ga., of 1910 in the city of Atlanta on the 22 day of May 1914.

Witness the Honorable James G. Woodward, Mayor, this 22 day of May, 1914.

Officer.

WALTER TAYLOR,
Clerk of Council.

61 EXHIBIT "B."

CITY OF ATLANTA
VS.
DAN S. LEHON.

Prosecution in Recorder's Court of the City of Atlanta.

The defendant demurs to the summons and statement of charges against him as stated therein on the following grounds:

1. Because the same are so vague and indefinite that it does not inform him of the nature of his accusation.

2. Because the words "violating sections 2024, 2025, 2026 and 2027 of City Code of Atlanta of 1910," being the words of the summons in which the offense of which this defendant stands charged is stated, are indefinite and uncertain, especially because the sections referred to relate to a number of separate offenses and defendant is not informed as to which one or more of these offenses he is accused of, or how or wherein he has violated said ordinances.

LITTLE, POWELL, HOOPER & GOLDSTEIN,
Defendant's Attorneys.

62 EXHIBIT "C."

CITY OF ATLANTA
vs.
DAN S. LEHON.

Prosecution in Recorder's Court of the City of Atlanta.

Now comes the defendant, and before filing his plea of not guilty, and in addition thereto, makes the following special defenses:

(Attached hereto marked exhibit "A," are made a part hereof, with the usual prayer for reference, are copies of sections 2024, 2025, 2026, 2027 and 2028 of the City Code of ordinances of the City of Atlanta, being all the ordinances of the City of Atlanta on the subject to which the charge against this defendant relates, and to which this plea relates.)

This defendant says that said ordinances, and each of them, are null and void for the following reasons:

1. That the City of Atlanta and the Legislative body thereof did not have and do not have any power or authority to pass said ordinances, nor does the charter of the City of Atlanta authorize them to enact any such ordinances, and said ordinances, and each of them, and all of them taken collectively, are beyond the powers of the City of Atlanta to enact or ordain.

2. Because said ordinances, and each of them, and all of
63 them taken collectively are unreasonable in the legal sense of the word:

(*a*) In that they require a license or permit for the carrying on of the business of a private detective agency in the City of Atlanta;

(*b*) Also in that they require, as a condition precedent to any person carrying on or being engaged in the business of private detective or detective agency, that — shall have first been recommended for a license or permit for such business by the Board of Police Commissioners of said City;

(*c*) Also in that it is provided therein that a detective or detective agency licensed under the provisions of said ordinances shall be subject to police supervision;

(*d*) Also in that it is made punishable for any person, firm or

corporation to engage in the business of a detective or detective agency (other than the police force of said city) without the license provided for in said ordinances;

(*e*) Also in that it provides that no licensed detective agency shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by
64 the Board of Police Commissioners and the Chief of Police and a certificate to that effect lodged with said detective agency;

(*f*) Also in that a penalty is imposed upon any licensed detective agency that sends out any person or agent to do detective work without the approval mentioned above, and in so far as it provides for the forfeiture of the license granted to such agency upon any such person being sent out.

3. Especially as applied to this defendant and to this case and to the transactions and activities which form the basis of the charge made against this defendant is said ordinance and each of them singly, and all of them collectively, illegal and void and unreasonable for each and all of the reasons set out above, and for the additional causes and reasons: That the activities of this defendant and the transactions for which he stands accused before the Court were exercised, had and done under an employment which involved an investigation of alleged illegal and criminal activities of the public detectives and of the police force of the City of Atlanta, and the employment of this defendant included as one of its principal parts the investigation of illegal acts already accomplished and
65 which petitioner's employers believed to be about to be accomplished by said police and detective forces of the City of Atlanta. This defendant was employed on behalf of Leo M. Frank, who was charged with the offense of murder and the police and detective forces of the City of Atlanta were suspected by the employers of this defendant of having used illegal and improper means for the procuring of testimony against said Leo M. Frank, and were engaged in an effort to prevent said Leo M. Frank from securing witnesses for an extraordinary motion for new trial which his counsel were about to file in his behalf, and said police and said detective force of the City of Atlanta were engaged in assisting the State's counsel in said case in the preparation of the State's case, and if, as a condition precedent to this defendant's doing the work in which he was engaged in the City of Atlanta he had been required to work under police supervision and to have his character and proficiency certified and approved by the Board of Police Commissioners and the Chief of Police it would have made it impracticable, if not impossible, for him to have made the investigation and to have done the work for which he was employed, and that each and all of the ordinances recited above are unreasonable and void in that, as applied to this transaction, they required that this defendant's
66 name, occupation and activity should be publicly disclosed, and should be made known to the very persons whose alleged unlawful conduct he was employed to investigate.

4. Also said ordinances, and each of them singly, and all of

them collectively, are void and unreasonable in that the effect of them is to expose to police supervision and to the approval of the police board and to the Chief of Police of the City of Atlanta all detectives and operatives of detective agencies who may be employed for the purpose of ferreting out and discovering and thwarting, by lawful means, the improper, illegal and criminal acts of the police officers of the City of Atlanta.

5. Said ordinances, and each of them and all of them, taken singly and collectively, are contrary and repugnant to the general laws of this State, to wit, it is provided in section 2165 of the Civil Code of the State of Georgia that "among the rights of citizens are the enjoyment of personal security, of personal liberty, private property and the disposition thereof," and the right of the citizens to the enjoyment of personal security and of personal liberty includes the right to employ effective means to guard that personal security and personal liberty and to hire and employ de-
67 tectives, where necessary, and without requiring that the names or activities of such detectives should be disclosed to the police, especially where the person whose personal liberty and personal security is involved is charged with crime and the police are engaged in assisting the prosecution; that one of the effective means of retaining and protecting that liberty and security of the person so charged with crime is to employ detectives who shall work secretly, and without their identity being publicly disclosed, and the right of the person whose personal liberty and personal security is involved to employ detectives, who shall work secretly and without their names being disclosed to the police or otherwise publicly, involves and carries with it as a necessary corollary the right of the detective so employed to work privately and without the disclosure involved in obtaining the permits and approval required by the city ordinances set out above, and without the police supervision mentioned in said ordinances. Defendant pleads that in the activities and transactions with which he stands charged he was employed on behalf of Leo M. Frank, who was charged with the offense of murder, and was employed to ascertain the truth in relation to the
68 homicide with which said Leo M. Frank stood charged and on account of which he was about to be deprived of his life, liberty, and personal security; that the investigations defendant was employed to make, in order to be effectively made, involved investigation into certain alleged illegal acts of the police force and detective force of the City of Atlanta, and for defendant to have made the application and to have taken the means necessary to secure the permits and approval required in said ordinances would have made it necessary for him to disclose the nature of his work and his identity in such wise that it would have been known publicly and especially to the police and detective forces of the City of Atlanta, and that thereby his employer and himself would have been deprived of the right to perform the services which were deemed by them to be essential, and which were essential to the proper defense and protection of said Leo M. Frank.

6. Defendant further pleads that the business of being a detective

and the business of carrying on a detective agency is a legitimate business and can not be properly and effectively exercised and carried on under police supervision or where the operatives employed are to be publicly known or are to be known to the Police Com-
69 mission and to the Chief of Police, and especially is this true where the detectives are engaged on behalf of the defense in a criminal case where the police are assisting in the prosecution, and that the ordinances which deprive the citizens of the right to employ detectives who have not complied with the terms of the ordinances, and the right of the detectives who have not so complied to engage in this business is a valuable right protected by the section of the Code cited above, which the ordinances in question would limit and destroy, and for these reasons the ordinances are repugnant to law and are void.

7. Defendant further pleads that each of the ordinances set out above and all of them, both separately and collectively are unconstitutional and void in that they are repugant to paragraph 2 of section 1 of article 1 of the Constitution of this State which provides that "Protection to person and property is the paramount duty of Government, and shall be impartial and complete." This defendant points out that the ordinances in question violate this section of the Constitution in that they require that before a detective or detective agency can exercise its activities in behalf of a defendant he must first disclose his identity to the police, and must make public
70 record of his employment and must work under police supervision, notwithstanding the police may be engaged in assisting the prosecution of the case, and it is not required that the activities of the police and of the public detectives who are engaged in working against him shall likewise be publicly disclosed.

8. As applied to the transaction in question the ordinances are unconstitutional and violative of the Constitutional provision set out above because defendant was employed in behalf of Leo M. Frank to ascertain evidence on his behalf and to ascertain the truth in relation to the charges which were made against him, which involved the ascertainment and investigation of the methods which had been used by the Police and Detectives of the City of Atlanta in procuring evidence against him. In order that said Leo M. Frank might have impartial and complete protection to his personal liberty and security it was necessary for defendant to carry out this employment without acting under police supervision of the police officers of the City of Atlanta, and without disclosing the nature of his employment and of his activities to the police commission, especially to the
71 Chief of Police of the City of Atlanta.

9. Defendant further pleads that each of said ordinances, and each of them, taken singly and collectively, are unconstitutional and repugant to paragraph 3 of section one of article 1 of the Constitution of this State, codified in section 6539 of the Civil Code of 1910, to wit: "No person shall be deprived of life, liberty or property except by due process of law." This defendant says and pleads that to require detective agencies and detectives to comply with the provisions of the ordinances as to obtaining the permit in question and ob-

taining the approval of the Board of Commissioners and of the Chief of Police as stated in said ordinances, and to work under police supervision, as stated in said ordinances, is to deprive them of their property rights without due process of law, for that the right to act as a detective agency and as a detective is a valuable right, and one within the protection of the Constitutional provisions cited above, and that the limitations imposed by each of said ordinances are of such a nature as to destroy the right, especially as applied to the transaction in question, where this defendant was employed by the defense in the case of the State against Leo M. Frank, in the prosecu-
72 tion of whom the police force of the City of Atlanta were assisting.

10. This defendant pleads that each of the ordinances in question, and all of them, whether taken singly or collectively, are unconstitutional and void and are repugnant to the fifth amendment to the Constitution of the United States, which provides "No person shall be deprived of life, liberty or property without due process of law," and to the fourteenth amendment to the Constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," on the ground that the right to act as a detective or as a detective agency is a valuable property right, and also a right of personal liberty, and especially so is the right to act as a private detective or detective agency for the defense of persons charged with crime, and because the ordinances mentioned above, by the limitations therein contained, whereby any detective or detective agency so employed must first obtain the approval or permission of the Police Commissioners, or must obtain the approval of the Chief of Police, or must work under police
73 supervision, is a substantial deprivation of this right, and especially is a substantial deprivation of this right in a case like the present, where the transaction for which this defendant stands charged involves an employment to protect the life and liberty of a person charged with crime (in the prosecution of whom the police are assisting) from alleged unlawful or criminal activities of the police themselves; this defendant having been employed on behalf of Leo M. Frank, charged with the offense of murder, to aid in the procuring of evidence, and the police of said city being engaged in assisting the State's counsel in the prosecution, and one of the things involved in the employment being the investigation into alleged illegal activities of the police force of said city in the procuring of evidence against said Leo M. Frank.

11. Defendant pleads that the employment offered to him was legitimate, that his right to accept the employment was a valuable property right; that to have complied with the ordinances would have been so to limit that right as to make it practically valueless, and such as to have seriously handicapped his ability to make his employment successful.

74 12. This defendant further pleads that he is a resident of the State of Louisiana, and of the United States; that under the first paragraph of section 2 of article 4 of the Constitution of the United States, (codified in section 6673 of the Civil Code of Georgia of 1910) "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." There is a statute of the State of Georgia, to wit, section 337 of the Penal Code of the State of Georgia of 1910, which provides that "No sheriff, mayor, or other person authorized by law to appoint special deputy sheriffs, constables, marshals, policemen, or other peace officers, or detectives, to preserve the public peace or detect crime, shall appoint, as such special deputy, special constable, marshal, policeman, or other peace officer or detective, any person who is not a citizen of this State, and no person shall assume or exercise such functions, powers, duties, or privileges incident and belonging to the office of special deputy sheriff, special constable, marshal, or policeman, or other peace officer or detective, without first having received his appointment in writing from the lawfully constituted authorities of this State." While this defendant pleads and contends that this section of the Penal Code of Georgia relates
75 only to the public detectives, or those engaged as police or peace officers of the State, and engaged by public authority, and does not apply to private detective agencies and private detectives, still, that if the same be construed to include private detectives and detective agencies, that the same is violative of the section of the Constitution of the United States quoted and referred to above, in that it deprives the citizens of States other than the State of Georgia of privileges that are conferred upon the citizens of Georgia, and therefore deprives this defendant of the privilege, to wit, the privilege of being a detective, or of acting as a detective, or of conducting a detective agency, of which the citizens of the State of Georgia are not deprived, and this defendant says and pleads that he is not and has not been engaged or appointed as a public detective by any of the authorities authorized by law of the State of Georgia to appoint or employ public detectives or detectives to act as peace officers or to detect and ferret out crime on behalf of the State or of any of its political subdivisions, nor has he been engaged in any capacity as such. Notwithstanding that defendant pleads and contends that said section of the Penal Code of the State of Georgia has no applicability to private detectives, still the Police Com-
76 mission of the City of Atlanta have construed it as applying to all detectives and to all detective agencies, both public and private, and on this account have a rule and a practice of refusing to grant any permit, license, recommendation or authority to any person other than a citizen of the State of Georgia to act as a detective or to carry on the business of a detective agency, and owing to this uniform practice and rule of the Police Commission of the City of Atlanta it is impossible for this defendant to comply with said ordinances, and he is thereby deprived of the right to engage in the business of a private detective or to carry on a de-

tective agency in said city, on account of the fact that he is a non-resident of the State of Georgia; and in violation of the clause of the Constitution of the United States which has been quoted above.

Wherefore defendant prays that he be discharged hence.

LITTLE, POWELL, HOOPER & GOLDSTEIN,
Defendant's Attorneys.

GEORGIA,
Fulton County:

Personally came before me Dan S. Lehon who on oath
77 says that the allegations of the foregoing plea are true.

DAN S. LEHON.

Sworn to and subscribed before me this May 26, 1914.

NASH R. BROYLES,
City Recorder, Atlanta, Ga.

EXHIBIT "A".

"Sec. 2024. Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm or corporation has been first recommended for license or permit for such detective business or agency by the Board of Police Commissioners of said City; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said city, outside of the
78 police force of said city, and without a license issued as hereinbefore provided for, shall be punished by a fine of not exceeding five hundred dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

Sec. 2025. Detective Agency—Bond Required—Use of Persons Injured By.—All persons, firms or corporations, licensed under authority of the Mayor and General Council, for the purpose of operating a detective agency, or following the occupations of detective, shall give a bond in the sum of $1,000. payable to the City of Atlanta, for the use of any person, firm or corporation, injured or damaged on account of any illegal act of such agency or detective or persons employed as detectives by such licensed agency or detective or any employee in and about their business licensed as aforesaid."

"Sec. 2026. Penalty.—Any person, firm or corporation carrying on a detective agency or following the occupation of detective, without giving bond as required in the foregoing section, shall on con-

viction in the Recorder's Court, be punished by a fine not exceeding
$500.00 or sentenced to work on the streets or public places
79 of the City, not exceeding thirty days, either or both penalties, to be inflicted, in the discretion of the Recorder."

"Sec. 2027. Certificate as to Character.—No detective agency now or hereafter licensed by the City of Atlanta, shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners, and the Chief of Police, and a certificate to that effect lodged with said agency."

"Sec. 2028. Penalty.—Any detective now or hereafter licensed by the City of Atlanta that sends out any person or agent to do detective work without the approval provided in preceding section of this ordinance shall thereby forfeit the license granted for such agency, and if it thereafter continues said detective agency, any person, agent or officer or manager of such agency shall, on conviction in the Recorder's Court of a violation of this ordinance, be fined for each day's operation as a separate offense, not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or forced to work upon the public works not exceeding thirty days, either or all of such penalties, to be inflicted in the discretion of the Recorder."

80 EXHIBIT "D".

Keep this exposed to view.
Subject to all ordinances of Council.

City Business License.

No. 23536. $25.00.

ATLANTA, GA., April 3, 1914.

Received of C. E. Sears Twenty Five Dollars for License as Detective Agency at No. — which authorizes said business from April 1, 1914, to June 30, 1914.

I certify that the amount charged is in accordance with the Tax Ordinance of this year.

E. E. WILLIAMS,
City Tax Collector.
WALTER C. TAYLOR,
City Clerk.

Not transferable except by consent of Council.

81 EXHIBIT "E."

GEORGIA,
Fulton County:

No. 756.

1914.

ORDINARY'S OFFICE, ATLANTA, March 28, 1914.

I, Arthur R. Marbut, Clerk of the Court of Ordinary of said County, do hereby certify that C. E. Sears, Agt. for Wm. J. Burns Detective Agency, 316 Healy Building, Atlanta, of said County, has this day registered in this office as Detective *Agency* as required by the Tax Laws of this State.

Fee Paid $1.00.

Given under my official signature, and the seal of the Court of Ordinary, the day and year aforesaid.

[SEAL.] ARTHUR R. MARBUT, *C. C. O.*

82 EXHIBIT "F."

Keep this exposed to view.

1914. *Special State Tax.* 1914.

$10.00. ATLANTA, GA., 3/10, 1914.

Received of C. E. Sears, Agt. Burns Detective Agency, ten & 00/100 dollars, for tax as detective at No. 318 Healy Bldg., which authorizes said business from January 1st, 1914, to December thirty-first, 1914.

A. P. STEWART,
Tax Collector Fulton County.

83 EXHIBIT "G."

The William J. Burns National Detective Agency, Inc.,
Representing American Bankers' Association,
606-608 Empire Life Building.

ATLANTA, GA., Sept. 10, 1912.

Mr. J. L. Beavers, Chief of Police, City.

DEAR CHIEF: I beg to hand you herewith a revised list of the operatives working under me, this in accordance with the rules of the board and of your request of recent date:

Operatives.

"	No. 1, Wm. Holloman	stationed at Jacksonville, Fla.
"	" 2, F. W. Mohun,	" " " Charlotte, N. C.
"	" 3, Wm. Johnson,	" " " Nashville, Tenn.
"	" 4, Thomas Hewitt,	" " " Atlanta, Ga.
"	" 5, C. D. Pinson,	" " " " " "
"	" 6, E. T. Petree,	" " " " " "
"	" 7, [G. C. Carson]*	" " " " " "
"	" 8, Edwin Smith,	" " " " " "
"	" 9, C. R. Gilbert,	" " " " " "

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"	No. 10, Edward Jones,	stationed at Atlanta, Ga.
"	" 11, M. S. Baughn,	" " " " " "
"	" 12, L. W. Ferguson,	" " " " " "
"	" 13, G. S. Saxton,	" " " " " "
"	" 14, H. Y. Garrett,	" " " " " "
"	" 15, Mrs. Fannie Lee,	" " " " " "
	R. V. Hancock.	
	E. R. Flanagan.	
	W. R. Cosby.	
	W. R. Adams.	
	S. A. Guilfoyle.	
	J. H. Winback.	
	[C. P. Young.]*	

Yours truly,

C. E. SEARS.

85 EXHIBIT "H."

ATLANTA, GA., Tuesday, March 5, 1912.

Hon. C. H. Mason, Chairman Board Police Commissioners of the City of Atlanta.

DEAR SIR: We, the committee appointed by the Chairman of the Board of Police Commissioners to investigate the application of C. E. Sears, Special Agent of the American Bankers' Association, beg to recommend as follows:

That the license be granted with the express understanding that the said Agency is to handle nothing in this jurisdiction except the banking interests so stated in their application, and as agreed by Mr. Felder, attorney for Mr. Sears, and that at any time they fail to comply with the said application their permit will be revoked.

Also, it is agreed that Mr. Sears shall present to this body, each and every man he wishes to work under him, and this body will pass upon said person, which is in compliance with the law.

Also, it is agreed that the said Agency will not do any work that

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[*Erased in copy.]

will conflict with our own body of local detectives, and that
86 said Agency will work in harmony with our local detectives.

GEO. E. JOHNSON, *Chairman.*
W. O. FAIN.
W. D. WHITE.

COMMISSIONERS' ROOM, ATLANTA, GA., March 5, 1912.

Committee Meeting: Police Coms. Johnson, White and Fain, present in interest of C. E. Sears' petition for detective license, etc.

Mr. Johnson: The first thing we want to find out from Mr. Sears, the applicant for this license, is the character of work he wants to do. I asked the Mayor today, I didn't think we had the right to grant a license to the Burns Agency, with Mr. Sears as local agent. We could grant the license to Mr. Sears himself.

Mr. T. B. Felder: Mr. Sears is the applicant. Of course you recognize that under the law you would be without law to grant a Burns' Detective Agency a license, therefore the application has been made through Mr. Sears, and he will be responsible for the proper conduct of the office, and if Mr. Sears should do any-
87 thing, or anybody in cooperation with him, that is improper, then his license would revoked. Of course the Pinkerton Detective Agency got application through former Chief Jennings and he is operating for those people. I want to say, as personal counsel for Mr. Burns, that he wouldn't desire to do any business here except for the fact that he has been retained by the American Bankers' Association. Mr. Sears' application, as I understand it, should contain the declaration if it does not, that he does not wish to engage in any domestic or divorce matters whatever, or strikes of any kind, he is not coming here on that kind of mission, and I think, instead of there being any opposition to the application, that all of the good citizens should favor it.

In addition to that, I want to state, Mr. Chairman and gentlemen, that my record in public and in private life I think will establish beyond controversy that I am in no sense antagonistic to organized or disorganized labor, and I want to say that several of the most prominent labor men have telephoned me and said to me in person, that they would be glad if Mr. Burns could receive a license, direct. If there is any opposition to this matter I haven't heard of it, but I want to add that I don't believe Mr. Burns,
88 and I know him rather intimately considering the short period of time I have known him, he came here with a letter of introduction from Mr. Dougherty whom I know very intimately, and I heard him express himself pretty fully and I think he is a friend to organized labor. He thinks, and I agree with him on the thought, that if you eliminate the element that has been engaging in unlawful practices, and divorce it from organized labor, that organized labor will be more dignified.

It is desirable to have this license granted in order that these people can take care of the interests they represent. There is no purpose, disposition or desire upon the part of this agency to take

any part or any participation in any strikes or disagreements between capital and labor, and, furthermore, there is no purpose to engage in domestic matters, divorce and that sort, and when the license is granted with those conditions, the minute they go beyond that scope the license is to be revoked.

Mr. Johnson: Mr. Sears here, now says he will have half a dozen experienced detectives here. Now these men will have to be passed upon; if we see fit not to pass upon them, will that be acceptable?

89 Mr. Felder: Yes, sir, perfectly so.

Mr. Johnson: The Board is very careful and they want to go right down into the merits of the case.

Mr. Felder: I did not state, but this license will be very helpful to the City of Atlanta, in that this will be headquarters for the entire Southern Division, and I think it will bring several reputable citizens here. I think it is a very necessary business and to that ex- it will be helpful to the City, because all the reports will be made to this department, and Mr. Sears recognizes, and as his legal adviser I will advise him, that he will not be permitted to operate any man until his character has been passed upon by your Board. You can eliminate any one of them or all of them as you desire.

90 ATLANTA, GA., February 22, 1912.

Hon. C. H. Mason, Chairman Board of Police Commissioners, Atlanta, Ga.

DEAR SIR: We beg to advise that at the quarterly meeting of the Atlanta Builders' Exchange held on February 21st the following resolution was unanimously adopted:

"Be it resolved by the Atlanta Builders' Exchange that we endorse the application of such able, honorable and recognized Detective Agencies as Burns' and are in favor of such Agencies being allowed to do business in Atlanta.

Be it further resolved that our Secretary is instructed to furnish a copy of this resolution to the Board of Police Commissioners of the City of Atlanta."

Yours very truly,

J. D. WOOD, *Secretary.*

91 EXHIBIT "I."

ATLANTA, GA., Feb. 13, 1912

To the Honorable Board of Police Commissioners, City.

GENTLEMEN: I hereby make application to your Honorable Body for a permit to conduct a detective agency in this city. In this connection I desire to state the objects and purposes of the business to be conducted as follows:

The purpose of the Agency is mainly to protect the Banks who are members of the American Bankers' Association in the territory to be served by the Atlanta office from criminal attacks. It having been decided to place a force of trained operatives in the South-

eastern territory with Atlanta as headquarters, in order to properly and economically protect our members, as stated. In order to do this legally we are advised that it will be necessary to have a licensed detective agency through which to transact our business. Desiring to comply with every legal requirement, this application is made to your honorable body, as aforesaid. It being understood and agreed that if the same is granted the business will be conducted for the objects and purposes as stated, and that no strike or divorce business of any nature whatever will be handled by the
92 Agency. As a guarantee of this I present to you the following list of endorsers after a study of which I trust your Honorable Body will see its way clear to grant the permit as prayed.

Yours very truly,

C. E. SEARS,
Special Agent American Bankers' Association.

ATLANTA NATIONAL BANK, ATLANTA, GA.
JAS. S. FLOYD, *Vice-Pres't.*
THE AMERICAN NATIONAL BANK OF ATLANTA, GA.
ROBT. F. MADDOX, *V.-P.*
THE THIRD NATIONAL BANK OF ATLANTA,
By T. C. ERWIN.
THE LOWRY NATIONAL BANK OF ATLANTA,
By HENRY W. DAVIS, *Cashier.*
THE FOURTH NATIONAL BANK OF ATLANTA,
By J. W. ENGLISH, *President.*
FULTON NATIONAL BANK.
W. J. BLALOCK, *Pres.*
CENTRAL BANK & TRUST CORPORATION,
By W. D. OWENS, *Cashier.*

93 GEORGIA,
Fulton County:

I, Dan S. Lehon, do solemnly swear that this petition for certiorari is not filed in the case for the purpose of delay only, and I verily believe I have good cause for certiorari, and that the facts stated in the foregoing petition, so far as they come within by own knowledge are true, and so far as derived from the knowledge of others I believe them to be true.

DAN S. LEHON.

Sworn to and subscribed before me this May 30th, 1914.

GEORGE CAMPBELL,
Notary Public, Fulton County, Ga.

94 GEORGIA,
Fulton County:

I, Dan S. Lehon, do solemnly swear that the foregoing petition for certiorari is true, that I have not had *had* a fair trial, and that I have been wrongfully and illegally convicted.

DAN S. LEHON.

Sworn to and subscribed before me this May 30th, 1914.
GEORGE CAMPBELL,
Notary Public, Fulton County, Ga.

95 Now comes the plaintiff in error, Dan S. Lehon, and naming the City of Atlanta as defendant in error, and within the time required by law, presents this bill of exceptions, praying that the same may be signed and certified, that the errors complained of may be considered and corrected.

No evidence (except in so far as the petition for certiorari, embodied herein may contain evidence) is necessary to an understanding of the errors complained of, nor is there any record in said matter except in so far as is herein contained.

LITTLE, POWELL, HOOPER & GOLDSTEIN,
Attorneys for Plaintiff in Error.

Postoffice address, 1608 Third National Bank Building, Atlanta, Ga.

96 GEORGIA,
Fulton County:

I do certify that the foregoing bill of exceptions is true, and contains all of the evidence and contains all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of the record in said case and certify the same as such and cause the same to be transmitted to the present term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected.

This, June 1st, 1914.

J. T. PENDLETON,
Judge Superior Court, Atlanta Circuit.

97 Due and legal service of the foregoing bill of exceptions duly signed by the Judge is acknowledged, copy received, and further service waived.

This, June 1st, 1914.

J. L. MAYSON &
W. D. ELLIS, JR.,
Attorneys for Defendant in Error.

Filed in office, June 1st, 1914.
ARNOLD BROYLES, *Clerk.*
(T.)

GEORGIA,
Fulton County:

I hereby certify, that the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, to wit:

DAN S. LEHON, Plaintiff in Error,
vs.
CITY OF ATLANTA, Defendant in Error.

Witness my signature and the seal of Court affixed this the 1st day of June, 1914.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

98 [Endorsed:] Case No. 5768. Court of Appeals of Georgia, March Term, 1914. Lehon versus City of Atlanta. Bill of Exceptions. Filed in office Jun- 1, 1914. Logan Bleckley, C. C. A. Ga.

99 Court of Appeals of Georgia.

5768.

LEHON
v.
CITY OF ATLANTA.

By the Court:

RUSSELL, *C. J.*:

1. Under the power conferred by the General Assembly upon the City of Atlanta to pass such ordinances for municipal purposes as the municipality may deem proper, provided such ordinances do not conflict with the constitution and laws of this State or of the United States (Acts 1913, p. 507), the City of Atlanta had the power to subject the business of a private detective or detective agency to police supervision, and to require that no person should carry on this business without being first recommended by the Board of Police Commissioners and after taking the oath of a city detective and giving a bond in the sum of one thousand dollars, as prescribed by the ordinances.

2. The ordinances in question, which prescribe that the character and proficiency of any person or agent acting as a private detective in the City of Atlanta shall be approved and certified by the Board of Police Commissioners and the Chief of Police, are a reasonable exercise of the power conferred by the charter, and are rea-
100 sonable regulations in the promotion and preservation of good order within the municipality. The ordinances under which the plaintiff in error was tried are not unreasonable, either because

they require a license or permit for the carrying on of the business of a private detective, or because the applicant must first be recommended for a license by the Board of Police Commissioners, or because the business of a detective is subjected to police supervision, or because they prescribe a punishment for engaging in the business of a detective unless a license has been obtained, or because they require that the character and proficiency of a private detective shall be approved by the Board of Police Commissioners and the Chief of Police and a certificate to that effect be obtained, or because the use or employment by a detective agency of a person or agent without the approval of the Board of Police Commissioners and Chief of Police may work a forfeiture of the license. All of these ordinances prescribe reasonable regulations in the enforcement of the inherent power conferred on the municipality under the general welfare clause of its charter.

3. As a general rule the power of a municipality to control its police department is inherent and exclusive, and the im-
101 position of regulations by which interference therewith is prevented or prohibited can not be said to be an unreasonable exercise of municipal power, although by the passage of ordinances having that effect it becomes impracticable for a private person to carry on the business of a private detective. In the case of such a conflict, salus populi suprema est lex.

4. The ordinances under which the plaintiff in error was convicted are not unconstitutional and void for the reason that they are repugnant to paragraph 2 of section 1 of article 1 of the constitution of this State, which declares that "Protection to person and property is the paramount duty of government and shall be impartial and complete," in that they require that before a detective can exercise his activities he shall disclose his identity to the police, make a public record of his employment, and work under police supervision. Whatever may be the terms or purposes of his employment, a detective is in essence a quasi peace officer, and the relinquishment by a municipality of the exercise of the right to supervise and regulate the conduct of a detective would amount, pro tanto, to the surrender or abrogation of appropriate municipal functions.

102 5. Nor are these ordinances unconstitutional because in violation of article 1, section 1, paragraph 5, of the constitution of Georgia, which declares that "No person shall be deprived of life, liberty, or property, except by due process of law," in that, as insisted, a compliance with the requirements of the ordinances would deprive the plaintiff in error of a property right superior to the right of the municipality to pass the ordinances in question in the interest of the public welfare.

6. The municipal ordinances under which the accused was convicted are not unconstitutional and void for the reason that they are in violation of the 5th amendment or the 14th amendment to the constitution of the United States, in that the plaintiff in error was thereby deprived of a property right without due process of law or deprived of equal protection of the laws; nor does it appear that

in the application and enforcement of the ordinances the plaintiff in error, as a citizen of the State of Louisiana, was denied any privilege or immunity extended to the citizens of the State of Georgia, especially in view of the fact that it appears undisputed in the evi-
dence that he never made application for a license to act as
103 a detective under the municipal ordinances, and therefore that no application upon his part to carry on his business in accordance with the municipal ordinances was refused by the officers of the municipality. Even if sections 337 and 338 of the Penal Code include private detectives within their provisions (and this is not ruled), the quasi official character of such peace officer renders the importance of the requirement that they be citizens of the State a reasonable exercise of the State's sovereignty within its territorial jurisdiction. If private detectives are not included with- the provisions of sections 337 and 338, then the ordinances under review in the present case are not void because they impinge upon the laws of the State, nor because they deprive citizens of another State of the equal protection of the laws; for they contain no requirement that applicants for license as a city detective shall be residents of the State of Georgia. So far as the plaintiff in error is concerned or affected thereby, the ordinances in question are not unconstitutional or void because of the construction given to them in their administration by the officers of the municipality, since he neither filed any
application to be himself licensed as a private detective, nor
104 took any step to have his name placed upon the list of the approved employees of the detective agency by which he was employed, and which had been licensed by the municipality; and therefore, as to him, the ordinances were never construed at all.

7. The evidence authorized the judgment of the recorder, and the judge of the superior court did not err in refusing to sanction the petition for certiorari.

Judgment affirmed.

Broyles, J., not presiding.

105 Court of Appeals of the State of Georgia.

ATLANTA, February 18, 1915.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered: Dan S. Lehon v. City of Atlanta.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be Affirmed.

Broyles, J., not presiding.

Bill of costs, $10.00.

106 Court of Appeals of Georgia.

No. 5768.

DAN S. LEHON, Plaintiff in Error,
vs.
CITY OF ATLANTA, Defendant in Error.

The Plaintiff in Error moves for a re-hearing on the following grounds:

1. Plaintiff in Error points out that the ruling of the Court in the 6th headnote of the opinion to the effect that the Plaintiff in Error is not in a position to assert the invalidity of the ordinance on the ground dealt with in that division of the opinion because he made no application to be licensed, is not well taken under the record in the case. The effect of the admission against the City arising from the striking of the defendant's plea, as well as the undisputed evidence in the case, shows that before the Plaintiff in Error began his activities the Police Board had construed their powers under the ordinance and had established a rule of practice by which they would not consider but would refuse without other reason, the application of every non-resident. The case, therefore, falls
107 squarely within the purview of the well recognized rule that offer, or tender or application is not necessary where it is clearly established that if such offer, tender, or application had been made it would have been futile and would have been unconditionally refused. Furthermore, if the ordinance be void either in whole or so far as it would relate to the Plaintiff in Error (that is to say, if as to him it would be wholly void and not merely void in certain parts as to him) then it would be void so far as it required him to make application, as well as void in so far as it required him to obey the provisions of the ordinance after the application had been made, and we do not understand the rule to be that one cannot test an ordinance which is void as a whole or uninforceable as to him because it is void in the part that relates to him; or that in such cases he has to undertake compliance with it before he can attack it as being void or uninforceable. This distinction is pointed out in the 18th headnote of the decision in the case of Campbell vs. City of Thomasville, 212, 238 et seq., and City of Augusta vs. Clark, 124 Ga. 254.

2. Furthermore, if the State law contained in Sections 337 and 338 of the Penal Code include private detectives then this
108 ordinance is wholly void as covering the same ground covered by the State law, and, therefore, it would not be necessary to show any compliance. The Court in the sixth division of its opinion in the present case fails to rule upon the question as to whether Section- 337 and 338 of the Penal Code had reference to private detectives. The plaintiff in Error insists that inasmuch as this point was squarely presented by the record and the argument that the Court should have passed upon it, and that if the point is well taken, namely, that those Sections do refer to public detectives, the

judgment should be reversed. If they do not refer to public detectives, then the Plaintiff in Error is entitled to a specific ruling to that effect for his own protection against prosecution under the State statute.

Respectfully submitted,

LITTLE, POWELL, SMITH & GOLDSTEIN,

Att'ys for Movant.

109 I, A. G. Powell, of counsel for the losing party in the above stated case, do certify that upon a careful examination of the opinion of the court I believe the facts, statutes and decisions stated have been overlooked by the court.

A. G. POWELL.

[Endorsed:] No. 5768. Court of Appeals of Georgia. Dan S. Lehon, Plaintiff in Error, vs. City of Atlanta, Defendant in Error. Original Motion of Plaintiff in Error for Re-hearing. Filed in office Feb. 24, 1915. W. E. Talley, D. C. C. A. Ga.

110 Court of Appeals of the State of Georgia.

ATLANTA, February 26, 1915.

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed: Dan S. Lehon v. City of Atlanta.

Upon consideration of the motion for rehearing filed in this case it is ordered that it be hereby denied.

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Georgia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Dan S. Lehon, plaintiff in error, and the City of Atlanta (a municipal corporation of the State of Georgia) defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Consti-
112 tution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of

the said plaintiff in error, Dan S. Lehon as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 8th day of March, in the year of our Lord one thousand nine hundred and fifteen.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by—
RICHARD B. RUSSELL,
Chief Judge Court of Appeals
of the State of Georgia.

Filed in office March 8, 1915. Logan Bleckley, Clerk Court of Appeals of Georgia.

113 [Endorsed:] Supreme Court of the United States, October Term, 1915. Dan S. Lehon vs. The City of Atlanta. Writ of Error.

114 UNITED STATES OF AMERICA, *ss:*

To the City of Atlanta, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Court of Appeals of Georgia, wherein Dan S. Lehon is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard B. Russell, Chief Judge of the Court of Appeals of the State of Georgia, this 8th day of March in the year of our Lord 1915.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgia.

Filed in office, March 8, 1915. Logan Bleckley, Clerk of the Court of Appeals of the State of Georgia.

115 In the Court of Appeals of Georgia, October Term, 1914.

DAN S. LEHON, Plaintiff in Error,
vs.
CITY OF ATLANTA, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Court of Appeals of Georgia.

Service of the petition for writ of error from the Supreme Court of the United States to the Court of Appeals of Georgia in the above case is acknowledged. Service is also acknowledged of order allowing said writ of error, assignment of errors and citation. All further service waived.

This March 8th, 1915.

WILLIAM D. ELLIS, JR.,
JAMES LUCAS MAYSON,
Attorneys for City of Atlanta, Defendant in Error.

Filed in office, March 8, 1915. Logan Bleckley, Clerk Court of Appeals of Georgia.

116 *Petition for Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia.*

DAN S. LEHON, Plaintiff in Error,
vs.
THE CITY OF ATLANTA, Defendant in Error.

To the Honorable the Court of Appeals of the State of Georgia and to the Honorable Richard B. Russell, Chief Judge thereof:

The petition of Dan S. Lehon by John D. Little, Arthur G. Powell, Marion Smith and Max F. Goldstein, his attorneys, showeth:

That on the 18 day of February 1915 the Court of Appeals of the State of Georgia made and entered a final judgment herein in favor of the defendant in error, the City of Atlanta, and against Dan S. Lehon, and on the 26th day of February, 1915, denied a rehearing thereon in which judgment and the proceedings held prior thereto in this cause certain errors were committed to the prejudice of this petitioner, Dan S. Lehon, all of which more in detail appear from the assignment of errors which is failed with this petition.

117 Dan S. Lehon further shows that in this action there was drawn in question the validity of a statute of or authority exercised under the State of Georgia on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of the validity of the said statute and authority; and in the said action Dan S. Lehon specially set up and claimed a

title, right, privilege and immunity under the Constitution of the United States, and the decision was against the title, right, privilege and immunity specially set up and claimed under such constitution. And in said action said Dan S. Lehon specially set up and claimed a title, right, privilege and immunity under the authority of the United States, and the decision was against the title, right, privilege and immunity specially set up and claimed under the authority of the United States, and that therein manifest error happened to the prejudice of Dan S. Lehon.

Petitioner further shows that the said Court of Appeals of the State of Georgia is the highest court of the said State of Georgia in which a decision in this action and proceeding could be had.

118 Wherefore Dan S. Lehon prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Court of Appeals of the State of Georgia for the correction of the errors so complained of; and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

This 8 day of March 1915.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Petitioner.

Filed in office March 8, 1915. Logan Bleckley, Clerk of the Court of Appeals of the State of Georgia.

119 In the Court of Appeals of the State of Georgia, October Term, 1914.

At Law.

DAN S. LEHON, Plaintiff in Error,
vs.
THE CITY OF ATLANTA, Defendant in Error.

This March 8th, 1915 came the plaintiff in error, Dan S. Lehon, by his attorneys and filed herein and presented to this court his petition praying for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of Georgia intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration hereof, this court being the court rendering the judgment complained of, the undersigned as Chief Judge of said court, does hereby allow the writ of error, the plaintiff giv-

120 ing and filing herewith an approved bond according to law in the sum of five hundred ($500.00) dollars, which shall

operate as a supersedeas bond, and the said writ of error to operate as a supersedeas.

In witness whereof this order allowing said writ of error is signed by Richard B. Russell, Chief Judge of the said Court of Appeals of the State of Georgia, this 8th day of March in the year of our Lord one thousand nine hundred and fifteen, in the city of Atlanta, Georgia.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office this 8th day of March 1915. Logan Bleckley, Clerk, Court of Appeals of Georgia.

121 In the Court of Appeals of the State of Georgia, October Term, 1914.

DAN S. LEHON, Plaintiff in Error,
vs.
THE CITY OF ATLANTA, Defendant in Error.

Know all men by these presents, that we, Dan S. Lehon, the plaintiff in error, as principal, and St. Clair Adams and United States Fidelity & Guaranty Co. of Baltimore, Md. as surety, are held and firmly bound unto the City of Atlanta (a municipal corporation of the State of Georgia) in the sum of five hundred dollars ($500.00) to be paid to the said obligee, its successors, representatives, and assigns; to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 4th day of March 1915.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the
122 Court of Appeals of the State of Georgia.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

DAN S. LEHON,
By His Attorney of Record, ARTHUR G. POWELL,
DAN S. LEHON,
Per MORRIS BURKA. [L. S.]
ST. CLAIR ADAMS. [L. S.]
UNITED STATES FIDELITY & GUARANTY CO.,
By F. L. BEBOUT, [L. S.]
Attorney in Fact,
Surety.

[CORPORATE SEAL.] UNITED STATES FIDELITY & GUARANTY CO.,
By FRANK H. REYNOLDS,
General Agent.

I hereby approve the foregoing bond and each of the sureties. Supersedeas of the judgment complained of is hereby also ordered. This March 8th, 1915.

R. B. RUSSELL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office March 8, 1915. Logan Bleckley, Clerk Court of Appeals of Georgia.

123 DAN S. LEHON, Plaintiff in Error,
vs.
THE CITY OF ATLANTA, Defendant in Error.

In the Matter of Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia.

Assignment of Errors.

The plaintiff in Error, Dan S. Lehon, in connection with his petition for writ of error in the above stated case makes the following assignment of errors, which he avers occurred upon the trial of said case and in the judgment of the Honorable the Court of Appeals of the State of Georgia, and which he respectfully submits appear in the record, proceedings, decision and final judgment of said court in said case:

I.

That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the
124 plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the recorder's court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws, (thereby being repugnant to the fourteenth amendment of the Constitution of the United States) and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely the privilege of engaging in the work of a private detective, (thereby being repugnant to and violative of paragraph 1, section 2 of article 4 of the Constitution of the United States) and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II.

The said court erred in holding and adjudging that the municipal ordinances of the city of Atlanta under which the plaintiff in

error was convicted in the recorder's court of the city of
125 Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived the plaintiff in error of his liberty and property without due process of law and denied to him, as a person within the jurisdiction of the State of Georgia the equal protection of the laws.

III.

That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the city of Atlanta under which the plaintiff in error was tried and convicted in the recorder's court of the city of Atlanta were not and are not violative of and repugnant to paragraph 1 of section 2 of article 4 of the Constitution of the United States which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV.

That the said court erred in holding and adjudging that
126 no defense was presented by special plea filed by the plaintiff in error in the recorder's court of the city of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the city of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied to him the equal protection of the laws, also in that they deprived Leo M. Frank, the person on whose behalf the plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also in that they abridged the privileges and immunities of plaintiff in error who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited, (and by the demurrer thereto admitted to be true), deprived the plaintiff in error and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of their liberty and property without due process of law, and denied
127 to each of them the equal protection of the laws, and abridged the privileges and immunities of plaintiff in error as a citizen of the United States and discriminated against him as a citizen of another State by refusing to him the privileges to which the citizens of the several States were entitled and which in the enforcement of said ordinances were so limited as to be enjoyed only — citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the recorder

of the city of Atlanta in striking and dismissing said special plea as being insufficient in law.

V.

That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by paragraph 1 of section 2 of article 4 of the Constitution of the United States, which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," had not been denied to him in the enforcement of the ordinances of the city of Atlanta under which he was tried and convicted in the recorder's court of the city of Atlanta; notwithstanding he was charged with having acted as a private detective in the city of Atlanta
128 without having been approved by the Chief of Police of said city of Atlanta and without a permit from the Police Commissioners of said City, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and, under the views of the law as held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI.

That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the recorder of the city of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency and doing the business of a private detective, in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he as a managing agent or supervisor of a private detective agency, which through
129 another agent had been duly licensed and granted a permit to do business in Atlanta, assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between or as a channel for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error) came within the purview of the said ordinances, and in that the court, in connection with this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII.

That the court erred in holding that the ordinances of the city of Atlanta under which the plaintiff in error was convicted are not and were not void and unconstitutional as applied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property
130 without due process of law and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely, Leo M. Frank, a prisoner charged with and convicted of murder with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinances was a condition precedent to the plaintiff in error being permitted to perform said services and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied
131 with said ordinances, and notwithstanding the effect of said ordinances was to compel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

Wherefore said plaintiff in error, Dan S. Lehon, prays that the judgment of the Honorable the Court of Appeals of the State of Georgia in the case aforesaid be reversed.

This March 8th, 1915.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for said Dan S. Lehon.

Filed in office this March 8, 1915. Logan Bleckley, Clerk Court of Appeals of the State of Georgia.

132 DAN S. LEHON, Plaintiff in Error,
vs.
THE CITY OF ATLANTA, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia.

Præcipe for Record.

To the Clerk of the Court of Appeals of the State of Georgia:

You are directed to incorporate into the transcript of record on the above stated writ of error and to transmit to the Supreme Court of the United States, the following portions of the record in said case:

1. The Writ of Error.
2. The citation and acknowledgment of service.
3. The petition for Writ of Error.
4. Formal order allowing the Writ of Error and directing supersedeas.
5. The bond on Writ of Error.
6. The assignment of errors.
7. This præcipe.

133 8. The bill of exceptions.
9. The opinion of the Court of Appeals.
10. The judgment of the Court of Appeals.
11. The motion for a rehearing.
12. The order overruling said motion.

Wherever a document is specified it is intended to include within the specification all entries, certificates, endorsements, acknowledgements and filings thereon or attached thereto.

This March 8th, 1915.

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Plaintiff in Error.

Service of the above præcipe is acknowledged. Further service is waived. This March 8th, 1915.

JAMES L. MAYSON,
WILLIAM D. ELLIS, JR.,
Attorneys for the City of Atlanta.

134 Filed in office this March 8, 1915. Logan Bleckley, Clerk, Court of Appeals of the State of Georgia.

135 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, April 3, 1915.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of Dan S. Lehon v. City of Atlanta which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 24,658. Georgia Court of Appeals. Term No. 103. Dan S. Lehon, plaintiff in error, vs. The City of Atlanta. Filed April 6th, 1915. File No. 24,658.

FILED
MAY 7 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

DAN S. LEHON,
Plaintiff in Error
vs.
THE CITY OF ATLANTA,
Defendant in Error

No. 914
October Term, 1914

Motion to Advance for Hearing

JOHN D. LITTLE
ARTHUR G. POWELL
MARION SMITH
MAX F. GOLDSTEIN
(Atlanta, Ga.)
Attorneys for Movant

JOHNSON-DALLIS CO., ATLANTA, GA.

IN THE SUPREME COURT OF THE UNITED STATES

DAN S. LEHON, Plaintiff in Error, vs. THE CITY OF ATLANTA, Defendant in Error.	No. 914, October Term, 1914. In Error to the Court of Appeals of Georgia.

The plaintiff in error moves the advancement of this case for hearing. It is a criminal case. Besides, a number of other prosecutions are pending in the court below dependent upon the decision.

Briefly stated, the matter involved is this:

The plaintiff in error, as an attache of the W. J. Burns International Detective Agency, was employed by the friends of Leo M. Frank, who had been convicted of murder in the courts of Fulton County, Georgia (in which the City of Atlanta is located), to assist the attorneys for the defense in the procurement and preparation of the affidavits necessary in connection with an extraordinary motion for a new trial which had been filed in that case.

In the Frank case, the Chief of Police of the City of Atlanta was prosecutor, and the police generally were aiding in the prosecution. The City of Atlanta has an ordinance entitled, "Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision," under which it is provided that no one shall

carry on the business of a private detective in Atlanta without permission of the police commissioners and the recommendation of the Chief of Police; and that when any one is licensed by the police commission he shall take the oath of a city detective and be subject to police supervision. The taking of the oath of a city detective makes him a public officer and puts him under control of the Chief of Police. The plaintiff did not comply with the provisions of the ordinance, and he was accused, tried and convicted for acting as a private detective without complying with the ordinance, and sentenced to a month's imprisonment with alternative of a fine of one hundred dollars. He applied to the superior court of the county for certiorari. This was refused. He took writ of error to the Court of Appeals and the conviction was sustained.

The Federal questions made in the trial court, and preserved throughout in the record, and decided against by the Court of Appeals, are these in the main:

The plaintiff in error is a citizen of Louisiana. Under a statute in Georgia, none but citizens of Georgia are eligible to act as detectives. This statute probably refers only to public detectives, but the police commissioners and the Chief of Police in Atlanta construe it as relating to all detectives, public and private; and by a uniform course of practice refuse to recommend or license any person not a resident of Georgia as a private detective. The Court of Appeals held that what the plaintiff in error did, namely receiving the reports of operatives, the interviewing of the witnesses and communicating of the result to Frank's attorneys, constituted the business of a private detective within the purview of the ordinance. One of the assignments of error here, based on the record, makes the point that since, under the ordinance and the ruling of the police commissioners, the plaintiff in error, on account of non-residence, could not be licensed to do this investigating work and was subject to penalty for

doing it without license, whereas citizens of Georgia could be, he was discriminated against, in violation of par. 1, section 2 of article 4 of the Constitution of the United States, which entitles the citizens of each State to all privileges and immunities of citizens in the several States. The point is also made that this violates the 14th Amendment of the Federal Constitution, in that it denies him equal protection of the laws, and deprives him of liberty and property without due process of law.

One of the matters the plaintiff in error was called on to investigate and report on to the attorneys for Frank was certain alleged illegal activities of the Chief of Police and other police officers of the city, in the procurement of evidence against Frank. There is a judicial admission in the record that it was impossible for him to perform these services and comply with the ordinance, that is to say, comply with it by disclosing to the Chief of Police the nature of his employment and working under the supervision of the Chief of Police, who was the prosecutor and one of the persons against whom the investigations were directed. It is insisted that the enforcement of the ordinance and the preventing of these things being done, deprived both Frank and the plaintiff in error of liberty and property without due process of law, and denied to them the equal protection of the laws: that the work the plaintiff in error was called on to perform was a legitimate employment and that the privilege of pursuing the employment was destroyed by the ordinance; that equal protection of the laws was abrogated by the requirement that those investigating for the defense in a criminal case should work under the supervision of and at the will of the prosecutor in that case.

The record also presents the point that the business the plaintiff in error sought to pursue was a legitimate and gainful occupation and that the ordinance by abolishing the business of private detective (especially as to the activities which the court below construed to be within

the purview of the ordinance) and in requiring all detectives to become public detectives deprived him of the right to pursue this occupation in violation of the 14th Amendment of the Federal Constitution.

Briefly stated, these are the main questions in the case; though other reasons, or amplification of these reasons why the ordinances violate federal constitutional rights appear in the record.

Due notice of the intention to file this motion has been given to opposing counsel.

Respectfully submitted,

JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for the Movant.

Due and legal service of the foregoing motion is acknowledged. Further notice is waived. We join in asking that the case be advanced.

This April 28th, 1915.

JAMES L. MAYSON,
WILLIAM D. ELLIS, JR.,
Attorneys for the City of Atlanta.

IN THE

Supreme Court of the United States.

DAN S. LEHON, Plaintiff in Error. *vs.* CITY OF ATLANTA, Defendant in Error.	No. 103. October Term, 1916.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the City of Atlanta, defendant in error, and moves this Honorable Court to dismiss the writ of error issued in the above case, and for cause thereof shows as follows:

Dan S. Lehon was convicted in the Recorder's Court of the City of Atlanta for the violation of an ordinance of the city and sentenced to pay a fine of $100 and costs.

He thereupon applied to the Judge of the Superior Court of Fulton County, Georgia, for a writ of certiorari, and the Judge declined to sanction the application, and refused to order the issuance of the writ.

Whereupon said Dan S. Lehon excepted to the order of the Judge of the Superior Court, declining to order the writ of certiorari, and carried same, by writ of error, to the Court of Appeals of Georgia.

The Court of Appeals held that the sentence imposed under the ordinance of the City of Atlanta was legal, and that same did not violate any of the provisions of the Constitution of the State or of the United States in any particulars upon which a decision was sought.

A writ of error was sued out returnable to the Supreme Court of the United States, and the plaintiff in error assigns error as follows:

I. That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the Recorder's Court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws (thereby being repugnant to the fourteenth amendment of the Constitution of the United States), and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely, the privilege of engaging in the work of a private detective (thereby being repugnant to and violative of Paragraph 1, Section 2 of Article 4 of the Constitution of the United States), and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II. The said court erred in holding and adjudging that the municipal ordinances of the City of Atlanta under which the plaintiff in error was convicted in the Recorder's Court of the City of Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived

the plaintiff in error of his liberty and property without due process of law, and denied to him, as a person within the jurisdiction of the State of Georgia, the equal protection of the laws.

III. That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the City of Atlanta under which the plaintiff in error was tried and convicted in the Recorder's Court of the City of Atlanta were not and are not violative of and repugnant to Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, which provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV. That the said court erred in holding and adjudging that no defense was presented by special plea filed by the plaintiff in error in the Recorder's Court of the City of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the City of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied to him the equal protection of the laws, also in that they deprived Leo M. Frank, the person on whose behalf plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also, in that they abridged the privileges and immunities of plaintiff in error, who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited (and by the demurrer thereto admitted to be true), deprived the plaintiff in error, and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of

their liberty and property without due process of law, and denied to each of them the equal protection of the laws, and abridged the privileges and immunities of plaintiff in error as a citizen of the United States, and discriminated against him as a citizen of another State by refusing to him the privileges to which the citizens of the several States were entitled, and which, in the enforcement of said ordinances, were so limited as to be enjoyed only by citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the Recorder of the City of Atlanta in striking and dismissing said special plea as being insufficient in law.

V. That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," had not been denied to him in the enforcement of the ordinances of the City of Atlanta, under which he was tried and convicted in the Recorder's Court of the City of Atlanta; notwithstanding he was charged with having acted as a private detective in the City of Atlanta without having been approved by the Chief of Police of said City of Atlanta, and without a permit from the Police Commissioners of said city, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and, under the views of the law as held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI. That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanc-

tion the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the Recorder of the City of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency, and doing the business of a private detective, in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he was a managing agent or supervisor of a private detective agency, which through another agent had been duly licensed and granted a permit to do business in Atlanta, assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between, or as a channel, for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error), came within the purview of the said ordinances, and in that the court, in connection with this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII. That the court erred in holding that the ordinances of the City of Atlanta, under which the plaintiff in error was convicted, are not and were not void and unconstitutional as applied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property without due process of law, and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely, Leo M. Frank, a prisoner charged with and convicted of murder, with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against

the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinance was a condition precedent to the plaintiff in error being permitted to perform said services, and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied with said ordinances, and notwithstanding the effect of said ordinances was to compel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

Defendant in error respectfully prays this Honorable Court to dismiss the writ of error issued in this case upon the following grounds:

1st. The record discloses the fact that the plaintiff in error did not make an application to the City of Atlanta or its Board of Police Commissioners for permission to follow the avocation of a detective, and therefore he is not in position to claim discrimination against him, no decision having been rendered for or against him by the City of Atlanta or its Board of Police Commissioners.

2. The record discloses the further fact that the Burns Agency, with which plaintiff in error is connected, had a representative in the City of Atlanta, being a citizen thereof, to whom a license was issued and through whom this agency did business in the city prior to the time said Lehon undertook to follow the avocation of a detective in said city. Therefore, he cannot claim any discrimination either against him or his agency.

3rd. The record discloses that the Burns Agency was licensed in the name of a citizen of the City of Atlanta to do business therein, and that, under this license, plaintiff in error could have been authorized to pursue his avocation in the City of Atlanta by recommendation of the Board of Police Commissioners, and that this local agent of the Burns Agency had, prior to the advent of plaintiff in error, a number of representatives so recommended. Hence, the action of plaintiff in error was premeditated, and his failure to secure permission to follow his business therein was not an oversight, but was purposely done, and, therefore, he cannot claim any discrimination against him or his agency on account of the existence of the ordinance under which he was convicted.

4th. The State of Georgia passed an Act providing that no detective could follow his avocation in the State unless permission to do so was granted by proper authorities, and the City of Atlanta was duly authorized to grant or refuse such permission, and this law, as well as the ordinances of the City of Atlanta, was an effort only to control the business of being a peace officer, or a detective, and that this power is inherent in every State and every locality, and that no right exists in the plaintiff in error to go into a community and undertake to go into the detective business without the permission of the community.

5th. The record discloses that the several constitutional provisions referred to, upon which the Court of Appeals passed, and which are made the basis of assignment of error to this court, have not been violated.

6th. Furthermore, it is manifest that the writ of error is taken for delay only, and that the questions on which the jurisdiction depends are so frivolous as not to need further argument, inasmuch as these questions have repeatedly been before this Honorable Court, and have often been decided adverse to the contentions of the plaintiff in error.

Wherefore, The City of Atlanta, defendant in error, prays this Honorable Court that the writ of error issued in this case be dismissed, or that the decision complained of be affirmed.

JAMES L. MAYSON,
SAML. D. HEWLETT,
Of Counsel for Defendant in Error.

I have read the foregoing motion by me subscribed, and the facts therein stated are true to the best of my information and belief.

JAMES L. MAYSON,

Sworn to and subscribed before me this
the 5th day of August, 1916.

FRED R. MILLER,
Notary Public, Fulton County, Georgia.
(Seal Attached.)

In the Supreme Court of the United States.

DAN S. LEHON, Plaintiff in Error, *vs.* CITY OF ATLANTA, Defendant in Error.	No. 103. October Term, 1916.

To Plaintiff in Error, or Attorneys, John D. Little, Arthur G. Powell, Marion Smith, Max F. Goldstein:

You are hereby notified that a motion to dismiss or affirm the writ of error in the above case will be submitted to the Justices of the Supreme Court of the United States on the 9th day of October, 1916.

Copy of said motion is herewith furnished you, together with the copy of printed briefs to be submitted thereon, as required by the rules of said court.

JAMES L. MAYSON,
SAML. D. HEWLETT,
Of Counsel for Defendant in Error.

Copy of the above notice received, together with a copy of the motion to dismiss or affirm, and a copy of the printed brief submitted thereon.

This the 6th day of September, 1916.

MAX F. GOLDSTEIN,
Of Counsel for Plaintiff in Error.

[redacted]

IN THE

Supreme Court of the United States.

(No. 103)

OCTOBER TERM. 1916

DAN S. LEHON, - - - - - - - *Plaintiff in Error,*

vs.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS

CITY OF ATLANTA, - - - - - - - *Defendant in Error.*

GENERAL STATEMENT.

This is a motion to dismiss or affirm a writ of error to reverse the decision of the Court of Appeals of Georgia (16 Ga. App. Report, page 64), affirming the judgment of the Superior Court of Fulton County, Georgia, which declined to sanction a petition for certiorari on the conviction of said Lehon in the Recorder's Court of the City of Atlanta.

Lehon was convicted in the Recorder's Court of the City of Atlanta for violating an ordinance of the city, found in the printed record on pages 35 and 36, which established a penalty for engaging in the business of being a private detective or detective agency unless the person or corporation undertaking this business had first secured a recommendation therefor from the Board of Police Commissioners of the city.

This ordinance provided that when this Board recommended the application, a license would be issued to such person or corporation to undertake this business, upon

taking the oath of a city detective, subjecting themselves to the police supervision of said city.

The plaintiff in error, Dan S. Lehon, was found guilty of violating this ordinance and it was admitted, during the trial in the police court, that he had never applied for this recommendation from the Board of Police Commissioners or the Chief of Police of the City of Atlanta, see page 11 of the printed record.

In brief, the plaintiff in error claims that because he was a citizen of the State of Louisiana at the time he undertook the business of being a detective in the City of Atlanta, that he was not required to go before the Board and secure this recommendation, especially in view of the fact that, as he claimed, this Board would have declined his application, as its custom was to license only residents of the State of Georgia.

Assignments of Error.

On the printed record, on pages 52, 53, 54 and 55, will be found in detail the specific assignments of error.

In brief, the plaintiff in error alleges that this ordinance was unconstitutional in that the enforcement of the ordinance deprived him of his liberty and property without due process of law and, also, in that it deprived him of equal protection of the laws, and in that the enforcement of said ordinance denied to him the privileges which were allowed the citizens of the State of Georgia.

Argument.

The City of Atlanta insists that the principles of law appealed to in this case have been settled for many years by the decisions of this court, and that the application of them to the facts of the present case involves nothing

new or novel, and that the facts of the present case present no question to this court which has not already been decided and, therefore, the writ of error should be dismissed and the decision of the lower court affirmed without further hearing.

However, the City of Atlanta especially insists that the present plaintiff in error is in no position to raise the questions here sought to be made because he made no application to the Board of Police Commissioners of the City of Atlanta for this recommendation, and, therefore, he cannot attack the enforcement of the ordinance, nor can he attack the method by which the ordinance was enforced.

Certainly plaintiff in error cannot leave the State of Louisiana, cross over to the State of Georgia and invade the City of Atlanta, and there set up business, and when he is prosecuted in the Recorder's Court for the violation of this ordinance, then make the point that he did not apply for the recommendation because same would not have been given to him.

After asserting that the recommendation would not have been given to him, he then proceeds to say that the ordinance is unconstitutional in that it deprives him of several very important constitutional rights.

This court in the case of Gundling vs. Chicago, 177 U. S. 183, had before it the consideration of a similar question where plaintiff in error was required to make an application to secure a license and did not do so, but when prosecuted for a violation of the ordinance undertook to attack the enforcement of the same as arbitrary and impartial.

Mr. Justice Peckham said: "Among the grounds of attack were the deprivation of property, arbitrary power,

denial of equal protection of the laws, etc."

In the course of the decision the court said:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. *Non constat* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of this discretion in his favor and was not refused a license."

We think that it is very clearly indicated in this excerpt that the court would not very seriously consider an attack upon the enforcement of an ordinance where the party making the attack had never submitted an application, and was not in position, as to himself, to show a refusal of grant of the permission sought.

The Court of Appeals of Georgia, Lehon vs. City of Atlanta, 16 Ga. App. Report 65, sixth head note, states the principle very clearly as follows:

> "The municipal ordinances under which the accused was convicted are not unconstitutional and void for the reason that they are in violation of the 5th amendment or the 14th amendment to the Constitution of the United States, in that the plaintiff in error was thereby deprived of a property right without due process of law or deprived of equal protection of the laws; nor does it appear that in the application and enforcement of the ordinances the plaintiff in error, as a citizen of the State of Louisiana, was denied any privileges or immunity extended to the citizens of the State of Georgia,

especially in view of the fact that it appears undisputed in the evidence that he never made application for a license to act as a detective under the municipal ordinances, and, therefore, that no application upon his part to carry on his business in accordance with the municipal ordinances was refused by the officers of the municipality. Even if Sections 337 and 338 of the Penal Code include private detectives within their provisions (and this is not ruled), the quasi official character of such peace officers renders the importance of the requirements that they be citizens of the State, a reasonable exercise of the State's sovereignty within its territorial jurisdiction. If private detectives are not included in the provisions of Sections 337 and 338, then the ordinances under review in the present case are not void because they impinge upon the laws of the State, nor because they deprive citizens of another State of the equal protection of the laws; for they contain no requirement that applicants for license as a city detective shall be residents of the State of Georgia. So far as the plaintiff in error is concerned or affected thereby, the ordinances in question are not unconstitutional or void because of the construction given to them in their administration by the officers of the municipality, since he neither filed any application to be himself licensed as a private detective, nor took any step to have his name placed upon the list of the approved employees of the detective agency by which he was employed, and which had been licensed by the municipality; and therefore, as to him, the ordinances were never construed at all."

The Burns Agency, with which Lehon was connected, had a license in Atlanta through a local man.

C. E. Sears, as shown by evidence, reported on pages

13 and 14 of the printed record, testified that he was the local manager of the Burns Agency, that is, local manager of the Atlantic branch. He exhibited a license registered with the city for the business of carrying on a detective agency.

It appeared that he applied to the Police Commission for a recommendation.

> "I let the Commission know that I was applying for it as agent of William J. Burns. Some questions were asked me by some members of the Board, and I stated to them that Mr. Burns was the head of the agency. I know Dan S. Lehon. He resides in New Orleans, is a citizen of Louisiana and of the United States. *He was working for Mr. Burns in what is known as the Mary Phagan or Leo Frank case.*
>
> "He came here to assist Mr. Burns in the Phagan case and is serving under Mr. Burns in what you might call detective work. He is here yet. He is here now. Has been on the case all the time. His name has never been reported by me to the police commission as a detective."

Again, in connection with the foregoing evidence, this witness testified:

> "I don't think it was necessary to have had him passed on by the Police Board nor for him to work under my license."

Further on, on page 15 of the printed record, this witness testified about the list of persons, being the list set out as reported to the Chief of Police, it is "one of the lists which I furnished to the Chief of Police."

The Chief of Police, on page 10, testified that the Pinkerton people had secured a license, through a former chief, Jennings, the agency standing in his, Jennings', name, and he submits the names of the operators to the Board.

Further on, on page 10, Chief Beavers testified:

> "Mr. Sears' application was passed up favorably by the Board to carry on a detective agency. He was passed up as an agent of the W. J. Burns Detective Agency, but the license was passed up in his name."

So, from the evidence of Sears, a representative of the Burns Agency, and of Beavers, the Chief of Police, it appears that the Burns Agency, through Sears, had permission to operate in the City of Atlanta, but that each operator was required to be reported to the Chief of Police, in the course of his operation as a detective in the city, and that this report was uniformly made, except in the instant case.

It further appeared that Pinkerton people operated in the same manner.

Therefore, we submit to the court that the agency, represented by Lehon, was licensed by the City of Atlanta, and that all Lehon had to do was to have his name reported to the Chief of Police and thereby secure all the privileges allowed any detective or detective agency.

It thus appears that Lehon purposely declined to have his name or his operations reported to the Chief of Police or Board of Police Commissioners of the City of Atlanta. In fact, Leonard Haas, an attorney, testified to the employment of William J. Burns "to check up the methods used by the police and detectives of the City of

Atlanta against Leo M. Frank." See page 12 of the printed record.

Lehon, plaintiff in error, testified, on page 20 of the printed report, as follows:

> "Q. What about your ability to work under police supervision and to do the work you were engaged in; could it have been done under police supervision effectively for your client? A. No, sir, it could not.
>
> "Q. Could you have made the investigation under police supervision? A. No, I could not.
>
> "Q. Could you have done the work for your client, Leo M. Frank? A. No."

From this it appears that the failure to register as a detective and to apply for recommendation to carry on the work in the City of Atlanta was intentional.

Plaintiff in error states in his evidence, in his opinion, he could not do the work he was employed to do if he complied with the city ordinances.

The present case therefore presents a very clean cut proposition, namely, a non-resident detective comes into a locality and purposely declines to comply with the laws of the locality because it would interfere with his work, and, when prosecuted for the violation of a local ordinance, seeks to justify his actions upon the ground that the ordinance is unconstitutional and void in that it discriminates against him as a citizen of the State of Louisiana.

We respectfully submit that this position is untenable from any standpoint, constitutional or otherwise.

Furthermore, where it appears that his agency had a permit, he is not in position to raise the question be-

cause the record discloses that his agency had a license granted to a local man, and that all plaintiff had to do was to register as required by the municipal ordinance.

The question sought to be made, namely, that the City of Atlanta would not allow a non-resident detective to operate in its territory, cannot be sustained in view of the fact that the Burns Agency, as well as the Pinkerton Agency, both operate in the city through a local man.

The City of Atlanta therefore submits that the record disclosed no discrimination against the plaintiff in error or his agency, but, on the contrary, shows that his agency was licensed and that he purposely declined to register as required by the local law and, hence, the record thus disproves any discrimination.

RIGHTS OF THIRD PARTY NOT ASSERTED BY LEHON.

In the fourth and seventh assignments of error, plaintiff in error undertakes to urge that his conviction was void because the ordinance, as enforced, was unconstitutional in connection with the rights of Leo M. Frank.

We think the principle is thoroughly established that the courts do not consume time in discussing constitutional objections as affecting one not a party to the case.

Cooley on Constitutional Limitations (5th Ed.), page 197, says: "A court will not listen to an objection made to the constitutionality of an act by a party whom it does not affect, and who has, therefore, no interest therein."

In the case of Reed vs. Eatonton, 80 Ga. 755, certain white people attacked a bill alleging that it was unconstitutional because the distribution of the funds was discriminatory as to negroes, but the Supreme Court of Georgia held that the absence of complaint by the negroes displayed satisfaction on their part, and that,

therefore, the white complainants could not urge the supposed rights of the negroes.

The Constitutional Questions.

Aside from the foregoing, which, in our opinion, disposes of any right on the part of the plaintiff in error to have his alleged grounds of complaint considered by this court, we submit that the various attacks upon the ordinance have no merit in them, and that the principles involved have long since been settled and are now well understood.

A detective is, of all persons, a quasi peace officer.

This was stated by the Court of Appeals of Georgia, 16 Ga. App. 64, in saying that, "a detective is in essence a peace officer, and the relinquishment by a municipality of the exercise of the right to supervise and regulate the conduct of a detective would amount, pro tanto, to the surrender or abrogation of appropriate municipal functions."

The States have never surrendered to the Federal Government the power to police its territory.

If the contention of the plaintiff in error is sustained, then detectives could be imported from one State to another and there demand, as a matter of right, all the privileges of a local detective. To state the case seems to us its answer.

A citizen of one State has no right, under the Federal Constitution, to enter into the jurisdiction of another State and there assume any authority over the enforcement of the laws in that community contrary to the laws of that city or locality.

All cities require their policemen to be elected and supervised by a board. Suppose Lehon had undertaken

the authority of a policeman in the City of Atlanta and, when summoned to the Recorder's Court to answer a complaint therefor, should assert his right as a citizen of Louisiana to enter into the State of Georgia and the City of Atlanta and exercise the functions of a police officer, and that, because he understood that the Police Board of the City of Atlanta would give this authority to only residents of Georgia, he, therefore, was exercising this authority without securing permission of the Board of Police Commissioners, and he was protected in this authority by the Constitution of the United States, would there be any serious doubt but that this contention would be both absurd and revolutionary? Now, where Lehon, a citizen of Louisiana, enters into the City of Atlanta and undertakes to discharge the duties of a "quasi peace officer" is not the right of a locality to say whether or not he shall be entrusted with this authority an inherent and supreme right? If this demand on the part of Lehon is sustained, then militia could come from the State of Louisiana, armed and equipped, and march across the State line and set up military authority because the State invaded would not grant the right to bear arms except to its own people. This is an extreme statement, but it is a logical conclusion from the one asserted by plaintiff in error in this case.

The Police Power.

When the right was given to establish a monopoly in the slaughtering of cattle in the State of Louisiana, not permitting any one else to engage in this business, the act authorizing the exercise of such power was violently assailed upon the grounds urged in the present case against the ordinance of the City of Atlanta.

In the present case, the main attack seems to be along the line that the plaintiff in error, a citizen of the State of Louisiana, is, under the ordinance, denied the privileges which were allowed citizens of the State of Georgia.

Mr. Justice Washington, as quoted in the slaughter-house case, said:

> "What are the privileges and immunities of citizens of the several States?" He then proceeds to answer the question as follows:
>
> "We feel no hestitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at times all been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign."

He then says that it would be more tedious than difficult to enumerate:

> "They may all, however, be comprehended under the following general heads: protection by the government with the right to acquire and possess property of every kind, and pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

In the course of the argument, in the slaughter-house case, the court said:

> "But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments, sub-

jecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other, and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

PEACE OFFICERS, UNDER STATE LAW, MUST BE RESIDENTS.

By an Act of the General Assembly of Georgia, found in Georgia Laws 1890-1, page 220, it is provided that no sheriff, mayor or other person authorized by law to appoint special deputy sheriffs, constables, marshals, policemen or other peace officers or *detectives* to preserve the public peace or *detect crime*, shall appoint, as such special deputy, special constable, marshal, policeman or other peace officer or detective, any person who is not a citizen of the State, and that no person shall assume these powers "without first having received his appointment in writing from the lawful constituted authorities of the State."

Under this provision the City of Atlanta could not give a license to Lehon to act as a detective because the State law prohibited it, but the city could do, what it did, license his agency through a local man, and this was done.

"A State can restrict the exercise of a vocation to citizens where the vocation is liable to lead to disorder."

Trageser vs. Gray, 73 Md. 250.

"A State can likewise pass a law whereby a li-

cense to retail intoxicating liquors shall be issued only to male inhabitants."

Welsh vs. State, 126 Indiana 71.

EQUAL PROTECTION.

The Federal provision securing equal protection was originally directed against race discrimination.

Slaughter-house Cases, 16 Wallace 36-81.

This doctrine has been very much developed and a majority of the cases, cited under this law, apply to the white rather than to the colored.

Overland vs. Hardy, 139 U. S. 362.

However, the evil can be looked to in order to arrive at the true meaning of the Constitution.

Generally speaking statutes regulating the practice of professions and pursuits of occupations are left to the discretion of the particular State.

People vs. Phippin, 70 Mich. 6.

State vs. Green, 112 Ind. 462.

Wallston vs. Nevin, 128 U. S. 570.

Barbier vs. Connolly, 113 U. S. 32.

Allen vs. Wyckoff, 40 N. J. L. 90.

Philadelphia Fire Association vs. New York, 119 U. S. 110.

We submit that the present case does not present facts calling for the enforcement of this provision of the Constitution.

A possibility of maladministration is not enough.

Williams vs. Mississippi, 170 U. S. 217-219.

Due Process.

This provision of the Constitution has been so often construed that it is easy to say that it applies only where the rights of the individual are taken from him without the orderly procedure in the courts.

Where the plaintiff in error has had his day in court and an opportunity to defend and his right of appeal has been protected, due process of law has been afforded.

Cooley's Constitutional Limitations, Sec. 356.
Dartmouth College vs. Woodward, 4 Wheat 518.
Second Kent's Commentaries, 10.

Fourteenth Amendment.

This amendment was not designed to interfere with the exercise of the police power by the States.

It does not undertake to withdraw from the States their inherent power to prohibit or regulate trades and occupations which are or may be unwholesome, or of regulating the use of property so as to guard against a use which is injurious to the community.

Davis vs. Massachusetts, 167 U. S. 43, 47.
Slaughter-house Cases, 16 Wall 36, 62, 81.
Powell vs. Pennsylvania, 127 U. S. 678, 683.
Holden vs. Hardy, 169 U. S. 366, 392

The courts have wisely left to the Legislature the right to exercise its discretion in matters pertaining to police and, if the object is conducive to the public interest, the Legislature has an unrestrained choice not only in the subject matter but in the means employed.

Lawton vs. Steele, 152 U. S. 133, 136, 140.

Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.

Crowley vs. Christensen, 137 U. S. 86, 89.

Gundling vs. Chicago, 177 U. S. 183, 188.

2 Tiedeman, State & Federal Control of Persons & Property (1900), p. 730, Sec. 145.

Conclusion.

We have endeavored to call the attention of the court to long established rules and, in view of these rules and because these rules are well known, we have asked that the judgment of the lower court be affirmed.

The principle is well stated in the third head note of the decision of the Court of Appeals. We adopt this language of the decision and express it as a principle of law that has been and, we believe, will be universally accepted:

> "As a general rule the power of a municipality to control its police department is inherent and exclusive, and the imposition of regulations by which interference therewith is prevented or prohibited cannot be said to be an unreasonable exercise of municipal power, although by the passage of ordinances having that effect it becomes impracticable for a private person to carry on the business of a private detective. In the case of such a conflict, salus populi est suprema lex."

Respectfully submitted,

James L. Mayson,

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Counsel for Defendant in Error.

FILED
SEP 28 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 103

DAN S. LEHON, *Plaintiff in Error,*

vs.

CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

RESPONSE TO THE MOTION TO DISMISS OR AFFIRM

JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH, AND MAX F. GOLDSTEIN, ATTORNEYS FOR THE RESPONDENT, DAN S. LEHON

JOHNSON-DALLIS CO. PRINTERS. ATLANTA

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Pending the briefing of the case in chief on the part of the plaintiff in error, notice of a motion on the part of the defendant in error to dismiss or affirm has been served.

For response the plaintiff in error asks leave to submit its brief in the main case.

An examination of this brief, as well as of the record in the case, will show that at least three, and probably more, distinct substantive federal constitutional questions are squarely raised by the record and the assignments of error. An examination of the record will show that the reason assigned by defendant in error as to why the plantiff in error cannot urge these constitutional questions is not well taken.

These questions are, it is respectfully submitted, neither so shallow nor so easy of disposition as the motion of the defendant in error and the brief in support thereof, seems to assume.

These questions are certainly not frivolous; the constitutional rights asserted are highly important. It has been the intention of counsel for the plaintiff in error to eliminate from the presentation of this case in this Court everything extraneous to the pure constitutional questions involved, but we believe it will be no material departure from this purpose to say that no man can read the record in this case without shock, and without surprise that this case could have arisen in a free government or in any community professing regard for individual rights and liberties.

The imputation that this writ of error was filed for delay only will hardly be indulged in view of the fact that the plaintiff in erorr moved to advance it for hearing at earliest opportunity.

The accompanying brief, which states the questions involved and the law points relating thereto are submitted as a part of this response, and reference to the same, as such, is prayed.

Respectfully submitted,

John D. Little,

Arthur G. Powell,

Marion Smith,

Max F. Goldstein,

Attorneys for Respondent.

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THE CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF OF JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH and MAX F. GOLDSTEIN,
Attorneys on Behalf of the Plaintiff in Error.

ABSTRACT OR STATEMENT OF THE CASE.

THE QUESTIONS PRESENTED.

The questions involved are as follows:

(1) Whether, as against the due process clause and the equal protection clause of the federal constitution, a municipality can abolish the occupation of a private detective, by requiring all private detectives to make application for a permit to the police commission of the city, obtain the approval of the chief of police, take the oath of the members of the police force (which oath binds them to make

arrests and perform all the other duties of public police officers of the city) and work under police supervision, thereby fully converting them from private detectives into public police officers.

(2) Whether a municipal ordinance of the character above described is constitutional where it is construed by the municipal authorities and the highest state court having jurisdiction to pass on the question as including in the word "detective" a person who being an office manager of a detective agency merely looks after office details, the employment and paying of operatives, and the assisting of counsel in the preparation of a motion for a new trial in a criminal case by interviewing witnesses, and who does no sleuth work, and exercises no function of a police or peace officer.

(3) Whether such an ordinance can be constitutionally enforced against a citizen of the State of Louisiana, by punishing him for doing only the acts mentioned above, when under the ordinances in question it is unlawful for any one to act as a private detective except upon his qualifying as a peace officer or public detective, and when the only municipal board qualified to issue the preliminary permit and the chief of police who must approve have both construed the ordinances as allowing only residents of the State of Georgia to receive permits, and have enforced the construction by uniform rule and practice; and when there is a statute making it criminal for any one other than a citizen of the State to act as a public "peace officer or detective."

(4) Whether one who is a citizen of another state but who does not act as a peace officer or public detective, but does only acts of a private nature in the line of an ordinary occupation having no connection with the duties of a public office is precluded from raising the question that

the ordinances referred to above, as construed by the local authorities and the highest state court having jurisdiction to pass on the same, discriminate against him by denying to him privileges which the ordinance and statute referred to confine to citizens of the state, because he carried on the private business referred to without applying for the permit or approval required by the ordinance, it appearing that the municipal authorities are enforcing the ordinance against him by fine or imprisonment, and it also appearing that the accused's employer had been informed in advance by the municipal authorities that none of his non-resident employees could be given permits; and that there is a state statute which would have made it criminal for him to complete his application.

(5) Whether as against the due process clause, and the equal protection clause of the federal constitution an ordinance which makes it penal for a private detective to work except with the approval of the chief of police and under police supervision, can be enforced under the circumstances of the particular case, to-wit: one Frank had been convicted for murder; an extraordinary motion for a new trial was pending; the chief of police and the police force under him were assisting in the prosecution of the case; the defendant Frank and his counsel were charging the chief of police and the members of the force with having procured evidence for the prosecution by illegal and criminal methods; the plaintiff in error acted as office manager for a detective agency employed to investigate the alleged illegal and criminal activities of the police officers, and besides exercising his managerial duties he also interviewed some of the witnesses and assisted counsel in the preparation of the motion for a new trial; and it appears that these services could not have been performed, if the ordinance were obeyed, for the obvious reason of the patent incompatibility of working in behalf of the defense and against the police officers, and yet working with

the approval and under the supervision of those very officers who were working in behalf of the prosecution, and whose illegal and criminal activities were the subject matter of the investigation. This question also involves the constitutional right of the defendant Frank to have his assistance in his defense and not to be required to subject his defense to the approval and supervision of his prosecutors, and, as a corollary, the right of the present plaintiff in error to be employed to do the work which Frank had the constitutional right to have done for him.

HOW THE QUESTIONS ARISE.

These questions are involved and the manner in which they are raised is as follows:

Lehon, the accused, was convicted in the recorder's court of the City of Atlanta for a violation of Sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta for "carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective, without being approved by the chief of police or board of police commissioners as required by the sections of the city code cited above" (transcript, p. 2).

THE ORDINANCES IN QUESTION.

Copies of the sections of the city code in question are in the record (transcript, pp. 35, 36) and are as follows:

> "Sec. 2024. **Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.**—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm, or corporation has been first recommended for license or per-

mit for such detective business or agency by the Board of Police Commissioners of said city; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said city, outside of the police force of said city, and without a license issued as hereinbefore provided for, shall be punished by a fine of not exceeding five hundred dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

Sec. 2025. Detective Agency—Bond Required—Use of Persons Injured By.—All persons, firms or corporations, licensed under authority of the Mayor and General Council, for the purpose of operating a detective agency, or following the occupations of detective, shall give a bond in the sum of $1,000, payable to the City of Atlanta, for the use of any person, firm or corporation, injured or damaged on account of any illegal act of such agency or detective or persons employed as detectives by such licensed agency, or detective or any employee in and about their business licensed as aforesaid."

Sec. 2026. Penalty.—Any person, firm or corporation carrying on a detective agency or following the occupation of detective, without giving bond as required in the foregoing section, shall, on conviction in the Recorder's Court, be punished by a fine not exceeding $500.00 or sentenced to work on the streets or public places of the city, not exceeding thirty days, either or

both penalties to be inflicted in the discretion of the Recorder."

"Sec. 2027. **Certificate as to Character.**—No detective agency now or hereafter licensed by the City of Atlanta, shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners, and the Chief of Police, and a certificate to that effect lodged with said agency."

"Sec. 2028. **Penalty.**—Any detective now or hereafter licensed by the City of Atlanta that sends out any person or agent to do detective work without the approval provided in preceding section of this ordinance shall thereby forfeit the license granted for such agency, and if it thereafter continues said detective agency, any person, agent or officer or manager of such agency shall, on conviction in the Recorder's Court of a violation of this ordinance, be fined for each day's operation as a separate offense, not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or forced to work upon the public works not exceeding thirty days, either or all of such penalties to be inflicted in the discretion of the Recorder."

STATE STATUTE IN CONNECTION WITH WHICH ORDINANCES ARE TO BE CONSTRUED.

These ordinances are to be taken in connection with Sections 337 and 338 of the Penal Code, (1910) of the State of Georgia, as follows:

"Sec. 337. **Appointment of Peace-Officers and Detectives.** No sheriff, mayor, or other person authorized by law to appoint special deputy-sheriffs, constables, marshals, policemen, or other peace-officers or detect-

ives, to preserve the public peace or detect crime, shall appoint, as such special deputy, special constable, marshal, policeman, or other peace-officer or detective, any person who is not a citizen of this State, and no person shall assume or exercise such functions, powers, duties, or privileges incident and belonging to the office of special deputy-sheriff, special constable, marshal, or policeman, or other peace-officer or detective, without first having received his appointment in writing from the lawfully constituted authorities of the State.

"Sec. 338. **Acting as Peace-Officer Without Authority.** Any person who shall, without authority, exercise or attempt to exercise the functions of, or hold himself out to anyone as, a deputy-sheriff, marshal, policeman, constable, or other peace-officer or detective shall be guilty of a misdemeanor; Provided, that nothing in this Article shall be construed to interfere with the police powers granted to conductors of passenger trains. Nor shall this and the preceding section apply in times of riot or unusual disturbance, or in other instances provided for by law."

The accused filed a special plea setting up the unconstitutionality of the ordinances. The trial court struck the special plea on general demurrer to the same on the ground that it was insufficient in law. (Transcript, p. 2).

The accused thereupon followed the statutory method of review, that is by presenting a verified petition for certiorari to a judge of the Superior Court, and, upon his endorsing refusal of sanction thereon, taking bill of exceptions and writ of error to the Court of Appeals. The Court of Appeals affirmed the judgment. Under the Georgia practice when this proceeding is taken, the facts stated in the verified petition for certiorari are judicially taken as the truth of the case; hence the case may be considered

as being here on undisputed facts; and this is especially true where the trial court struck the special plea on general demurrer, it being presumed in such cases that if the plea had not been stricken and the accused had been given opportunity to do so he would have proved all the facts as pleaded, and that therefore, for the purposes of the questions involved, the opposite party admits all facts stated in the plea to be true. (For a statement of the practice and the presumption as to the truth of the case as claimed by the accused, see Linder vs. Renfroe, 1 Ga., App. 58; Marks vs. State, 8 Ga. App. 283.)

THE FACTS.

The facts briefly stated are as follows:

Lehon was a resident of Louisiana, being the manager of the Southern Division of the Wm. J. Burns National Detective Agency, with headquarters in New Orleans. That Agency was duly licensed in Atlanta, the license being taken in the name of one Sears, a citizen of Atlanta, it being understood, however, at the time that he was taking it as local manager of the Burns Agency, (Transcript, pp. 11, 13, 22, 36, 37, 39).

Lehon came to Atlanta to assist the Burns Agency in the defense of one Leo M. Frank, charged with murder; the work he did being the general supervision of the local office, the employment of operatives, and the checking up with the witnesses certain testimony alleged to have been given by them in connection with the case, and to give assistance to defendant's counsel in the preparation of the case.

He exercised none of the functions of a police officer; nor any of the sleuth work of an operative detective.

He did not apply for or secure the approval of the chief of police or the police board, nor did he report to the chief of police as required by the ordinances.

THE OATH REQUIRED BY THE ORDINANCES.

He did not, therefore, take the oath prescribed in Section 2024 of the city charter, which oath is found in the charter of the City of Atlanta (an act of the general assembly of the State of Georgia of which the courts take cognizance) i. e., in Georgia Laws 1874, p. 135, section 37, which is to be taken in connection with section 38 of the same statute, as follows:

> "Sec. 37. They shall take an oath, faithfully and impartially to discharge the duties imposed on them by the laws of the State, and the ordinances of the City, and shall give such bonds as may be required of them by the City ordinances."
>
> "Sec. 38. It shall be their duty to make arrests of any persons violating the ordinances of said City, with or without summons, and also with or without warrant. They shall likewise make arrests of any persons who have violated the statutes of said State, and their arrests for such violations are hereby authorized, either with or without warrants therefor. They shall perform such other duties as may be imposed by the laws of the State, and ordinances of the General Council."

SUMMARY OF THE SPECIAL PLEA.

This special plea made the point that the ordinances are void on the following grounds in substance, (omitting those which do not involve federal constitutional questions):

That the right to act as a private detective or to run a detective agency is a valuable property right, also a right of personal liberty, and this is especially true when the activities are employed on behalf of one accused of crime; that the ordinances, when construed together, absolutely

prohibited the occupation; and that this was especially true as to the activities for which he was being tried, namely acting as an investigator on behalf of one accused of crime where the police force of the city were prosecutors and where the particular matter under investigation was the alleged illegal and criminal methods used by the police in the procurement of evidence in that case; and that the requirement that he should take the oath of a policeman, be approved by the chief of police and work under police supervision, and report to the chief of the police would render his task impossible.

That he is a citizen of Louisiana, and that under the ordinances, taken in connection with the State law, and as construed by the police commission, under an unbroken practice of that board, he could not be given a permit because the board had ruled and had enforced the ruling, that none but citizens of Georgia could be licensed as private detectives. That the ordinance was, therefore, void as depriving him of liberty and property without due process of law, denying him equal protection of the laws, and refusing to him as a citizen of Louisiana privileges and immunities granted to citizens of Georgia. These same points in substance arise under the evidence.

THE UNDISPUTED FACTS.

There is no dispute or contradiction in the record as to these facts.

The accused acted only as a private detective, i. e., as one who did office work in checking up the reports of operative detectives and who in some cases in person interviewed and obtained statements from witnesses. His chief duty was to assist defendant's counsel in the preparation of the evidence in the case of Leo M. Frank (transcript, p. 18).

That the accused did not act or assume to act as a pub-

lic detective. He did not exercise or assume to exercise any function as a police officer or as a peace officer.

That the accused is a citizen of Louisiana.

That the police commissioners of the City of Atlanta have construed the law as prohibiting them from granting any permit, license or recommendation to any detective, public or private, unless he be a citizen of Georgia. This is admitted by the demurrer to the special plea (see transcript, p. 34) and is shown by the testimony of the police commissioners themselves (transcript, pp. 21-23). The testimony of the chief of police shows that he likewise construed the ordinances (see transcript, pp. 18, 19).

That while the accused had not personally made application to the commissioners for a permit or to the chief of police for his approval as a private detective, the Burns Agency of which he was an employee, had been notified in advance of the board's construction of the ordinances, and of the fact that no permit could be issued to him unless he became a resident of the City of Atlanta. (See Exhibit "H" to the testimony, transcript, pp. 38-41, and testimony of commissioner Johnson, transcript, pp. 22, 23.)

That the chief of police and the other members of the police force of the City of Atlanta were actively assisting the prosecution in the case of Leo M. Frank.

That one of the principal matters involved in the investigations being made by and under the direction of the accused was certain alleged illegal and criminal methods that had been used by these police officers in procuring evidence for the State.

That compliance with the ordinances would have rendered the performance of this service futile, if not impossible, since the ordinances required the disclosure to the chief of police of the activities of all private detectives and required them to work under the supervision of the police. It is obvious that an investigation of illegal and criminal practices of the chief of police and his police officers could not be made effectively under the supervision of the very

men who were accused of the illegal and criminal practices; and it is so alleged in the special plea and shown in the evidence.

The exceptions to the overruling of the special plea, and the other exceptions made by the assignments of error in the petition for certiorari present certain constitutional questions, which, however, are so far as this court is concerned, set out in the assignments of error presented in connection with the writ of error from this court, and which therefore are not repeated here.

THE HOLDING OF THE STATE COURT OF APPEALS.

The Court of Appeals held:

That the ordinances do not conflict with either state or federal constitution.

That although the ordinance had the effect to make it impossible for any private person to carry on the business of a private detective, the ordinance was nevertheless valid, on the ground that the municipality had the power to prevent interference with its police department.

That irrespective of the terms of his employment a detective is in essence a quasi police officer, and subject to municipal control.

That the right of the municipality in these respects is superior to the property right of the individual to engage in the occupation, and that, therefore, to prohibit the occupation is not to deprive the individual of property or liberty in violation of the due process of law clause of the federal constitution or to deny him the equal protection of the laws.

That the court would not pass upon whether the police commissioners could grant a permit to a non-resident, nor upon the question as to whether the uniform rule and practice of the police commissioners in refusing permits to non-residents discriminated against the plaintiff in error

as a citizen of Louisiana, since he had not made application for a permit.

That under the evidence his activities were such as to make him a detective within the purview of the ordinance.

SPECIFICATON OF THE ERRORS RELIED UPON.

The following errors are relied upon:

I.

That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the recorder's court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws, (thereby being repugnant to the fourteenth amendment of the Constitution of the United States) and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely the privilege of engaging in the work of a private detective, (thereby being repugnant to and violative of paragraph 1, section 2 or article 4 of the Constitution of the United States) and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II.

The said court erred in holding and adjudging that the municipal ordinances of the City of Atlanta under which the plaintiff in error was convicted in the recorder's court of the City of Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived the plaintiff in error of his liberty and property without due process of law, and denied to him, as a person within the jurisdiction of the State of Georgia, the equal protection of the laws.

III.

That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the City of Atlanta under which the plaintiff in error was tried and convicted in the recorder's court of the City of Atlanta were not and are not violative of and repugnant to paragraph 1, section 2 of article 4 of the Constitution of the United States which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV.

That the said court erred in holding and adjudging that no defense was presented by special plea filed by the plaintiff in error in the recorder's court of the City of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the City of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied him the equal protection of the

laws, also in that they deprived Leo M. Frank, the person on whose behalf the plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also in that they abridged the privileges and immunities of plaintiff in error who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited, (and by the demurrer thereto admitted to be true), deprived the plaintiff in error and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of their liberty and property without due process of law, and denied to each of them the equal protection of the laws and abrigded the privileges and immunities of plaintiff in error as a citizen of the United States and discriminated against him as a citizen of another State by refusng to him the privileges to which the citizens of the several States were entitled and which in the enforcement of said ordinances were so limited as to be enjoyed only by citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the recorder of the City of Atlanta in striking and dismissing said special plea as being insufficient in law.

V.

That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by paragraph 1, of section 2 of article 4 of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states," had not been denied to him in the enforcement of the ordinances of the City of Atlanta

under which he was tried and convicted in the recorder's court of the City of Atlanta; notwithstanding he was charged with having acted as a private detective in the City of Atlanta without having been approved by the Chief of Police of said City of Atlanta and without a permit from the Police Commissioners of said city, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and under the views of the law was held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI.

That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the recorder of the City of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency and doing the business of a private detective in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he as a managing agent or supervisor of a private detective agency, which through another agent had been duly licensed and granted a permit to do business in Atlanta assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between or as a channel for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error) came within the purview of the said ordinances, and in that the court, in connection with

this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII.

That the court erred in holding that the ordinances of the City of Atlanta under which the plaintiff in error was convicted are not and were not void and unconstitutional as supplied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property without due process of law and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely Leo M. Frank, a prisoner charged with and convicted of murder with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinances was a condition precedent to the plaintiff in error being permitted to perform said services and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied with said ordinances, and notwithstanding the effect of said ordinances was to com-

pel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

ARGUMENT.

ANALYSIS OF THE ORDINANCES.

Notwithstanding the circuitous route taken by the ordinances in question to reach the end in view, their object and purpose are frankly stated in the title to the first of them (City Code, Section 2024) as follows: "Detective Agency Business Abolished".

The abolition of the business of private detectives is accomplished by requiring a license or permit from the police commissioners and by requiring the licensee to take the oath of a city detective and to be subject to police supervision. This ipso facto and at once converts the private detective from a private detective into a police and peace officer of the city. A reading of the oath, and the statement of the duties thereby assumed, both of which are set out in full in the preceding statement of facts show undoubtedly that this is correct.

The meaning and effect of the ordinances would have been exactly the same if it had been directly enacted under penalty that "none but public officers of this city who are appointed, licensed or permitted by the Board of Police

Commissioners, and who have taken oath as such and duly given bond, and who work under police supervision shall do the work hitherto done by private detectives and private detective agencies, and all other persons are forbidden to follow the occupation of a private detective."

DEFINITION, BY CONSTRUCTION, OF THE WORDS, "PRIVATE DETECTIVE."

The phrase "private detective" has no clearly defined meaning, but for the purposes of this case it has been defined to the extent that it includes one who exercises no public function, who exercises none of the functions of a peace or police officer, but who only does managerial office work, interviews witnesses and reports to counsel—the work of an ordinary investigator; in fine, the same character of work that the chief claim agent of a railroad company or other corporation would do—because this point was expressly made that these activities did not constitute one a private detective within the purview of the ordinances, and was decided against by the Court of Appeals of Georgia.

THE OCCUPATION, AN ORDINARY LAWFUL CALLING.

The occupation of private detective, especially as defined in this case, is a lawful calling. It is so in its nature, and is so recognized by the statutes of Georgia. The general tax act of the State of Georgia, found in Civil Code of Georgia (1910) section 931 taxes it as an ordinary occupation in the following language:

> "Upon each and every person doing detective work, or engaging in the business of a detective for hire or compensation, the sum of ten dollars for each located office established in this State, and if no established office, then said tax shall be required in each county in

this State wherein any detective may do or offer to do detective work."

In Georgia the taxing of a business in the general tax act carries the conclusive implication that it is a lawful occupation. Miller vs. Shropshire, 124 Ga. 829.

> "The general tax acts * * * * are purely revenue measures, though enforceable by penalty for failure to pay the imposed tax, as distinguished from police measures designed to regulate internal affairs."
>
> Miller vs. Shropshire, Supra., p. 832.

The right to engage in the business of a private detective is in its very nature a valuable property right—a reputable means of earning a livelihood.

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may chose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one in like conditions. The interest, or as it is sometimes termed, the estate acquired in them, that is the right to continue their prosecution is often of great value to the possessor, and cannot be arbitrarily taken from them any more than real or personal property can thus be taken."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed. 623, 625.

See also the valuable monographic note appended to the case of State vs. Hinman, 65 N. H. 103, as reported in 23 Am. St. Rep. 22, 25.

The occupation pursued by the plaintiff in error, as characterized by the acts he did, call it what you may, is a plain, common ordinary business.

> "There is no magic in language, though used by a constitutional convention, which can change a private business into a public one. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare by organic act or legislative ordinance that such place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation." Per Mr. Justice Field, dissenting in Munn vs. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77, 88.

The ordinances here involved are not regulations of a business, but as has been pointed out are absolute prohibitions.

THE CONSTITUTIONAL RIGHT TO FOLLOW A LAWFUL CALLING.

The right to pursue any lawful calling is, of course, a right protected by the federal constitution.

Allgeyer vs. Louisiana, 165 U. S. 578. 41 L. Ed. 832.

There is no intention on the part of the plaintiff in error to argue that the State cannot regulate business, or in some cases abolish or suppress occupations or create monopolies in certain occupations, or that the consent of some board or officer may not lawfully be made a condition precedent to individuals engaging in certain businesses.

We understand the rule to be that the fourteenth amendment of the federal constitution guarantees the citizens against arbitrary spoliation of property rights in private occupations, and guarantees equal protection to all simi-

larly situated; that no general and unlimited power resides in the State legislative bodies to regulate purely private business, except wherein it is affected with some public interest; that the means employed must not be unreasonable and unnecessary to the accomplishment of such lawful purpose as might justify legislation on the subject; that the interference with private business must not be arbitrary; that while the State may as to some occupations create a monoply this does not relate to purely private occupations; that in all cases the exercise of the police power is subject to the supervision of the courts.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220;

Dobbins vs. Los Angeles, 195 U. S. 223, 49 L. Ed. 169;

Lawton vs. Steele, 152 U. S. 133-137, 38 L. Ed. 385 388.

"The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Connally vs. Union Sewer Pipe Co., 184 U. S. 540. 558, 46 L. Ed. 679.

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of action of purely personal and arbitrary power."

Yick Wo vs. Hopkins, 118 U. S. 356, 369, quoting ap-

provingly in Chicago M. & St. P. Ry. Co. vs. Tompkins, 176 U. S. 167, 172, 44 L. Ed. 417.

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. Los Angeles, 195 U. S. 223, 236, 49 L. Ed. 169.

"But this concession (that certain businesses may be regulated) does not in the slightest degree affect the proposition, which I deem a fundamental one, that the ordinary pursuits of life, forming the large mass of industrial vocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, the liberty of pursuit."—Concurring opinion in Butchers Union Co. vs. Crescent City Etc. Co., 111 U. S. 746, 763; 28 L. Ed. 585, 589.

THE ORDINANCES, NOT AN EXERCISE OF THE POLICE POWER.

Even though the subject be one as to which the exercise of the police power is legitimate, the exercise must be had with due regard to constitutional rights and the regulation

must have relation to the end for the accomplishment of which the exercise of the police power is authorized. Under the guise of accomplishing some object within the police power the law making body cannot adopt regulations which are not legitimately adapted to that end and which infringe constitutional guarantees.

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Whatever may be the supposed evil arising from leaving private detectives unregulated, the regulation must be directed toward that evil and not something else. If the object be to confine the business to persons of good character, that object is not accomplished by making the detectives take an oath to assume the duties of a public police officer; or by a regulation which confines the business to residents of the State. The question of the proficiency of a private detective would seem to be a matter in which the public is not concerned and with which only the private detective and his employer are concerned; but even if it is, the regulation in question is not designed to that end, except in the minor detail that no detective agency shall employ a private detective unless the latter's proficiency is approved by the chief of police. The detective agency probably would be a better judge of what type of man it needed than the chief of police. The activities of private detectives might be curbed by uniform regulations, but it is arbitrary to curb them by the requirement that regulates them only by putting them under the undefined, unrestricted, supervision and control of the police commission and the chief of police of the city.

When the ordinances are construed as a whole, especially in connection with the state statute with which they must be construed, and are carefully studied to ascertain the object in view in their passage, the conclusion irresistably forces itself on the practical mind that the only intent and purpose (theoretical or practical) of the ordinance was to

drive out of the business all detective agencies which would not co-operate with the police of the city, and do the bidding of the police authorities; first, by providing for police approval, then for the putting of every detective under the oath of allegiance, then for subjecting his activities to police supervison; also to exclude all non-residents from the business. The ordinances cannot fairly be construed as compatible with any other legislative design. And the evidence discloses that in practical operation they were given that effect.

If the phrase "private detectives" had been construed by the state authorities as including only those who exercised some function likely to affect public safety, good order or morals, the ordinances, on their face, (oppressive as they are) might not be so unreasonable or arbitrary as to justify judicial interference. For instance, private persons are sometimes employed to act as guards for individuals who are in danger of private violence, or as protectors of property in case of strikes, etc., and they undertake to make arrests for offenses committed in their presence, and to perform other services akin to those pertaining to peace and police officers. To place such activities under police supervision might be reasonable.

But here the occupation pursued has no relation to public safety, good order or morals or any of the other wards of the police power. The state authorities and the State Court of Appeals construe the ordinance as including this occupation. To regulate this business by the abolishment of it, and to transfer the sole right to pursue it to those licensed, sworn and supervised as public police officers, would seem to be purely arbitrary; it would appear that the regulation is neither reasonable nor necessary to any object legitimately to be accomplished in the exercise of the police power; that it creates a monopoly in a purely private business which the State would not have the power wholly to suppress.

MERE DEFINITION CANNOT TAKE AWAY CONSTITUTIONAL RIGHT.

At this point in the argument we call attention to a proposition which is involved not only in the question immediately under discussion, but also in practically all of the other questions in the case:

The proposition is, that any enactment which is not a legitimate and constitutional police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted in a context which professes a purpose which would be the proper object for the exercise of that power.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441.

In the Coppage case, just cited, the Kansas statute professed to be an act to penalize the coercion of employees. The act penalized the coercion by employers or would-be employers of employees or applicants for employment as to agreeing not to join labor union as a condition to the employment or continuing in the employment.

The Kansas Court held that one who presented to his employee a written agreement to withdraw from a labor union, but left it optional with the employee whether he would sign or quit work was guilty under the act. The United States Supreme Court, held that the fact that the statute uses the word "coerce" or that the Kansas Supreme Court stresses that word in its opinion is immaterial; that since the state court treated the term "coerce" as applying to the only activities engaged in by the accused, the effect was to construe the statute as including these activities and to enforce it so as to prohibit them; "there being no finding nor any evidence to support a finding that the plaintiff in error was guilty in any other sense," that the Court would examine the evidence to the extent necessary in order to determine the federal question asserted.

The Court also said:

> "If the right that the plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term 'coercion'."

The court again reiterates, "to avoid possible misunderstanding," that the purpose declared in the title of the acts is immaterial—that "this court deals not with moot cases of abstract questions, but with the concrete case before it."

The court declared the statute unconstitutional as applied to the transaction in question.

Now in the case at bar we contend that under the guise of regulating peace and police officers, the municipal legislative body could not include in the enactment one who pursued an ordinary avocation having no relation to the functions of peace or police officers by calling him a "detective;" that the Court of Appeals having held that a detective is a peace officer "whatever may be the terms and purposes of his employment;" and "there being no finding nor evidence to support a finding that the plaintiff in error was guilty in another sense" than that he engaged in the non-public activities referred to; and the entire evidence being in the record, the Court will examine it to the extent necessary in order to determine the Federal right that is asserted; and that if the right that plaintiff in error exercised is founded upon a constitutional basis, the Court will protect it against impairment, notwithstanding its inclusion by the State authorities or courts in a false definition, or in an enactment which as to activities of another nature may be valid exercise of the police power.

THE DISCRIMINATION AGAINST PLAINTIFF IN ERROR ON ACCOUNT OF HIS CITIZENSHIP.

Thus far we have discussed the ordinances without regard to the question of discrimination between residents and non-residents, because the present case is a test case on which certain other cases depend in which the question of non-residence is not involved.

When we go a step further and get to the real object and result of the ordinance, namely, to prohibit all but residents of Georgia from doing private detective work of all kinds, the invalidity of the ordinance becomes, we submit, perfectly clear.

The State can of course prescribe that none but residents can hold public office in the State; but it is respectfully insisted that the State cannot lawfully prescribe that none but its own citizens who are public officers can carry on a purely private business.

For example, shoemakers are frequently justices of the peace, and vice versa. The State may lawfully prescribe that none but its own citizens may be justices of the peace; but it cannot then, without violating paragraph 1, of section 2 of article 4 of the Constitution of the United States, go further and prescribe that none but justices of the peace may be shoemakers.

The State of Georgia, through sections 337 and 338 of the Penal Code of 1910 (quoted in full in the abstract and statement of facts incorporated in this brief) has provided that none but citizens of the State may exercise any of the functions of "deputy-sheriffs, constables, marshals, policemen, or other peace officers or detectives, to preserve the public peace or detect crime". The word "detective" used in this statute, by its association, plainly means "public detective"; and, as this word, as used in this statute, has never been otherwise construed by the Georgia courts, we assume this court will adopt that construction. So construed, this statute is conceded to be lawful. But when,

following this statute, the city of Atlanta enacts that no one shall follow the occupation of private detective (and includes in the enactment by construction the purely private activities involved in the present case) who is not licensed and sworn as a public police officer working under police supervision, the unlawful discrimination against the non-resident is at once effective.

To state the proposition a little differently and in the concrete: Lehon is a citizen of Louisiana, under the protection of the constitutional guarantee that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; he is a managerial officer in a detective agency, performing purely private functions; he wishes to pursue his business in Atlanta in the State of Georgia; in attempting to do so he finds a local ordinance that for him to do so he must first become a public officer and be appointed and qualified as such, and must perform his businesses as such; he also finds a statute of the State of Georgia making it criminal for him to become such an officer by reason of his non-residence; citizens of Georgia may qualify to pursue the occupation, he may not because he is a citizen of another state. The discrimination intended by the ordinance, though somewhat indirectly effectuated, is nevertheless perfectly patent and well accomplished except for the constitutional guarantee which avoids the ordinance.

> "It is undisputably the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed., 623, 625.

> "In all cases of the class to which this one before us

belongs it is a test question whether there is any discrimination in favor of the State or of citizens of the State which enacted the law. Whenever there is such discrimination it is fatal."

Howe Mach. Co. vs. Gage, 100 U. S. 676, 25 L. Ed. 755, 756.

Even in the exercise of the police power there must be no discrimination between residents and non-residents.

Webber vs. Virginia, 103 U. S. 344, 26 L. Ed. 565.

Even as to intoxicating liquors the rules applies.

Walling vs. Michigan, 116 U. S. 446, 29 L. Ed. 691;

Scott vs. Donald, 165 U. S. 58, 41 L. Ed. 632;

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Statute prohibiting a non-resident from being a trustee void.

Roby vs. Smith, 131 Ind. 346, 31 Am. St. Rep. 442, 15 L. R. A. 792.

The principle is recognized in Georgia.

Gould vs. Atlanta, 55 Ga. 678 (1);

Atlanta vs. Jacobs, 125 Ga. 523 (1).

THE PLAINTIFF IN ERROR NOT PRECLUDED FROM RAISING THE QUESTION.

There is no dispute in the record that this discrimination exists, or that the police commissioners, to whom application for permits must be made, or the chief of police,

whose approval is necessary, had uniformly refused permits and approval to non-residents, they having construed the ordinance, taken in connection with the state penal statute on the subject, as forbidding the issuance of permits and approvals to non-residents. Counsel for the City took the position, and doubtless will urge it again, and the Court of Appeals of Georgia in its decision sustained the contention, that the plaintiff in error is not in a position to make the question because he made no application to the police commissioners or to the chief of police for permit or approval. They rely upon the proposition (perfectly sound when properly applied) announced in Gundling vs. Chicago, 177 U. S. 183, and recognized in a number of other cases, that where a statute makes the permit of an officer or tribunal a condition precedent to one's engaging in an occupation, one who has not applied for a permit, cannot make the point that the officer or tribunal is vested with an arbitrary discretion to refuse.

The present case is clearly without the reason given in those cases, and is, we submit, not within the rule.

Here all the valid parts of the ordinance (if any parts were valid) were complied with. The state, county and municipal license taxes were paid by the agency upon whom they were imposed. This puts the plaintiff in error in position to make the question. See—

Campbell vs. Thomasville, 6 Ga. App. 212 (18), 238.

THE STATE LAW MADE IT CRIMINAL FOR THE PLAINTIFF IN ERROR TO COMPLY WITH THE ORDINANCE.

However, the most cogent reasons why the plaintiff in error is excused from attempting to comply with the ordinances are these:

(1) Application on his part would be futile—an idle thing—because the police commission and the chief of police

had a uniform rule and practice, known both to them and communicated to the employer of the plaintiff in error, that no permit would be granted to a non-resident. Tender is always excused when the person to whom the tender is to be made has in advance formed and announced an intention to refuse.

(2) Compliance with the ordinance on the part of the plaintiff in error would have been a crime on his part under the laws of the State of Georgia. The license or permit could not be issued to him unless he contemporaneously took the oath of a city detective; and he could not take the oath (being a non-resident) without violating the provisions of Sections 337 and 338 of the Penal Code of Georgia (already quoted in full); which forbid that any, except citizens of Georgia, "shall assume or exercise such functions, powers, duties or privileges."

The ordinances, read in connection with the State law, embrace a legislative scheme by which no license or permit can be issued to a non-resident. The police commissioners and the chief of police so construed them, and properly so. The ordinances do not in express words forbid a non-resident from applying for a permit; but do enact such a legislative scheme as to forbid such an application.

It is not a case of an ordinance good in part and bad in part, where the bad can be separated from the good, and still leave a sufficiency of the legislative scheme intact to be enforced. If the main and pervading legislative object cannot constitutionally be accomplished, the ordinances fail as a whole, are of no force and effect, and no person is called upon to obey them in whole or in part; and no person should be punished for not obeying them.

VIOLATION OF CONSTITUTIONAL RIGHTS THROUGH THE ENFORCEMENT OF THEM, UNDER THE PARTICULAR CIRCUMSTANCES.

Coming now to the sixth question proposed at the beginning of this brief, we take up the proposition whether the enforcement of the ordinances under the particular circumstances of the present case were not violative of the due process and equal protection clauses of the federal constitution.

A statute, though fair on its face, may not be enforced if under the circumstances of a particular case it would deprive a person of life, liberty or property without due process of law or deny him the equal protection of the laws.

> Yick Wo vs. Hopkins, 118 U. S. 356; 30 L. Ed. 220;
>
> Dobbins vs. Los Angeles, 195 U. S. 223, 240, 49 L. Ed. 169.

To act as investigator for the defense in a criminal case and be under the supervision of the prosecutors in the case; to investigate the illegal and criminal activities of the police under the supervision of those charged with the illegal and criminal activities, are absurdities. To regulate the business of attorneys at law is probably a fair exercise of the police power, but to provide that the attorney for the accused in a criminal case should conduct the defense under the supervision of the prosecuting attorney would be abhorent to our sense of justice, as well as to the federal constitution.

> "Under our system the people, who are the subjects, are the sovereigns. Their rights, whether collective or individual, are not bound to give away to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in

power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered."

U. S. vs. Lee, 105 U. S. 196, 208, 27 L. Ed. 177.

The right to defend one's self against a criminal charge is a right protected by the federal constitution.

The right to defend one's self in the courts involves the right to employ all necessary and legitimate means to make that defense successful; and the right to employ others to assist in the defense, involves as a corrolory the right of those so employed to be employed and to perform the employment.

The right of both the government and of the accused to prepare for prosecution or defense, as the case may be, is an inherent right, and is one which is to be freely exercised without molestation.

In re, Quarles, 158 U. S. 532, 39 L. Ed. 1080.

The Quarles case decides the specific proposition that the right of the citizen to assist in the prosecution of a criminal case is one of his fundamental rights which is within the protection of the constitutional guarantees, but this holding is based on the proposition that the citizen has the same rights as to prosecution that he would have as to defense, and upon the implication that no one would deny that every citizen has the right to defend himself freely in the courts, and to have others to assist him with like freedom and protection,—that these are fundamentals embraced in the very covenant of government.

The proposition that Lehon had the free right to make an adequate and untrammeled investigation of the illegal acts of the police against his employer is directly settled by the decision. This right, so the case holds, neither state nor city, could abridge, but, on the contrary, should protect.

It is submitted that to require that Leo M. Frank should not defend himself against the charge of murder, or perfect his extraordinary motion for a new trial by proof that the evidence obtained against him was not credible because of the illegal and criminal means employed to obtain it, except upon the condition that those employed by him to make the necessary investigations which he could not make, being in jail, should work and investigate under the supervision of those who were prosecuting him, would be to deprive him of his life or liberty without due process of law; and would be to deny him the equal protection of the laws. As a corrolary to this proposition, the constitutional provisions protects those employed to do the work.

But it is said that no one may assert another's constitutional rights in his own behalf. Where there is no privity or community of interest this is generally true; but like all good rules it has its exceptions.

We apprehend that if a statute were passed requiring a sheriff, under penalty, to hang, without trial, a person indicted for a certain crime; and the sheriff should refuse to obey the law, and the penalty were about to be enforced against him he could assert the unconstitutionality of the statute on the ground that its enforcement would deprive the person required to be hanged without trial of his life without due process of law.

In the case of Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, the court having reached the conclusion that the statute of Louisiana could not limit the contractual powers of a person in another state, held also that the statute could not reach one who in Louisiana did an act to make that contract effectual; in other words, Allgeyer was allowed to set up the constitutional privileges of his non-resident correspondent.

The right of the prisoner to take the necessary means for his full and proper defense, begets in the person employed as being necessary to the successful prosecution of that defense a like right to do the acts which are appro-

priate to the defense, and both of these are rights which are protected by the Fourteenth Amendment of the Constitution of the United States.

Logan vs. United States, 144 U. S. 263, 36 L. Ed. 429;

In re, Quarles 158 U. S. 532, 39 L. Ed. 1080;

In re, Yarbrough, 110 U. S. 651, 28 L. Ed. 274.

These cases are cited, not for the ultimate and specific proposition which they decide, namely, that the Federal Government can protect, by affirmative penal legislation, those rights which are conferred, either expresly or by implication, by the Constitution, but because all of them hold that where a major right exists the protection of that right includes as a necessary consequence the protection of all rights subsiduary and ancillary to it. That is to say, as applied to the case at bar, it being unconstitutional to deprive a prisoner of the right to defend himself in the courts by all adequate and proper means and to employ others where necessary to aid him in his defense, it is likewise unconstitutional to deprive the persons whom it is necessary for him to employ for that purpose of the right of accepting and properly executing the employment. In other words, to deprive Leo M. Frank of the right to defend himself from the charge of murder and to employ detectives to make lawful investigations for him would be to deprive him of the rights guaranteed by the fourteenth amendment of the Federal Constitution; and it follows that this right as a major right includes, with like protection, the subsidiary right which, as a corrollary, flowed to the detectives, of accepting and executing that employment.

REPLY TO POSITION TAKEN BY DEFENDANT IN ERROR.

While the preparation of this brief was in progress counsel for the defendant in error has served copy of a

motion to dismiss and affirm and a brief in connection therewith. Some of the propositions therein submitted are already covered by the foregoing brief, but some of them are new.

In the brief of our opponents on the motion to dismiss (p. 7) the position is now taken that since the Burns Agency, through its local representatives, had a permit from the police commissioners, all that Lehon would have had to do to comply with the ordinance was to be approved by the chief of police—this under Sec. 2027 of the City Code. That section provides:

> "Sec. 2027. Certificate as to Character.—No detective agency now or hereafter licensed by the city of Atlanta shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners and the Chief of Police, and a certificate to that effect lodged with said detective agency."

But the only penalty for violation of that section is contained in Section 2028 of the City Code, and is forfeiture of the agency license. Plainly, Lehon was not convicted under that section, since he was punished by fine, with alternative of imprisonment under the provisions of Section 2024 which provides:

> "Sec. 2024. Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm or corporation has been first recommended for license or permit for such detective business or agency by the Board of Police Commissioners of said City; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the

> Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said City, outside of the police force of said City, and without a license issued as hereinabove provided for, shall be punished by a fine of not exceeding Five Hundred Dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

To the original charge against the accused which was stated in indefinite language, a demurrer was filed calling for further information as to the nature of the charge. (Exhibit B, transcript pp. 28, 29). The charges were amended by adding "that the defendant is charged under sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta of 1910 with carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective without being approved by the Chief of Police or Board of Police Commissioners as requested by these sections of the City Code cited above." So that while Section 2027 is mentioned in the charge, there was no act charged against him under that section, which is directed solely against detective agencies sending out unlicensed agents and not against the agents themselves.

The opposing brief on the motion to dismiss and affirm (p. 10) stresses the point that the Court of Appeals has held that a detective is a peace officer, and therefore the regulation thereof is a matter exclusively within the police power. The plaintiff in error has not insisted that the State does not have full and complete control of its police officers and peace officers and all others who exercise any authority over

the enforcement of the laws of the State, and may not confine appointments to these offices to residents. But in this case, the striken special plea, judicially admitted to be true, alleged that the defendant had exercised none of these functions; and the evidence on this point is likewise undisputed. The Court of Appeals, in deciding the case, fairly recognized this fact, and met the question fairly by saying "**Whatever may be the terms of his employment,** a detective is in essence a quasi peace officer." It is from this judgment of the Court of Appeals that this writ of error has been sued out; and we respectfully insist that the holding is erroneous.

When the State undertakes to exclude citizens of other states from occupation, open to its citizens, this court will look beyond mere definitions, and will look to see what are the terms of the employment, and whether the business actually pursued, irrespective of what anw state legislative or judicial body may call it, is such as that the State may confine the pursuit of it to its own citizens. The Supreme Court of the United States will disregard all form and superficiality and look to substance.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441;

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S. 226, 234, 41 L. Ed. 979;

Fayerweather vs. Ritch 196 U. S. 276, 297; 49 L. Ed. 193;

Scott vs. McNeal, 154 U. S. 34; 38 L. Ed. 896.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 103

DAN S. LEHON, *Plaintiff in Error,*

vs.

THE CITY OF ATLANTA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF OF JOHN D. LITTLE, ARTHUR G. POWELL, MARION SMITH and MAX F. GOLDSTEIN,
Attorneys on Behalf of the Plaintiff in Error.

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Attorneys on Behalf of the Plaintiff in Error.

ABSTRACT OR STATEMENT OF THE CASE.

THE QUESTIONS PRESENTED.

The questions involved are as follows:

(1) Whether, as against the due process clause and the equal protection clause of the federal constitution, a municipality can abolish the occupation of a private detective, by requiring all private detectives to make application for a permit to the police commission of the city, obtain the approval of the chief of police, take the oath of the members of the police force (which oath binds them to make

arrests and perform all the other duties of public police officers of the city) and work under police supervision, thereby fully converting them from private detectives into public police officers.

(2) Whether a municipal ordinance of the character above described is constitutional where it is construed by the municipal authorities and the highest state court having jurisdiction to pass on the question as including in the word "detective" a person who being an office manager of a detective agency merely looks after office details, the employment and paying of operatives, and the assisting of counsel in the preparation of a motion for a new trial in a criminal case by interviewing witnesses, and who does no sleuth work, and exercises no function of a police or peace officer.

(3) Whether such an ordinance can be constitutionally enforced against a citizen of the State of Louisiana, by punishing him for doing only the acts mentioned above, when under the ordinances in question it is unlawful for any one to act as a private detective except upon his qualifying as a peace officer or public detective, and when the only municipal board qualified to issue the preliminary permit and the chief of police who must approve have both construed the ordinances as allowing only residents of the State of Georgia to receive permits, and have enforced the construction by uniform rule and practice; and when there is a statute making it criminal for any one other than a citizen of the State to act as a public "peace officer or detective."

(4) Whether one who is a citizen of another state but who does not act as a peace officer or public detective, but does only acts of a private nature in the line of an ordinary occupation having no connection with the duties of a public office is precluded from raising the question that

the ordinances referred to above, as construed by the local authorities and the highest state court having jurisdiction to pass on the same, discriminate against him by denying to him privileges which the ordinance and statute referred to confine to citizens of the state, because he carried on the private business referred to without applying for the permit or approval required by the ordinance, it appearing that the municipal authorities are enforcing the ordinance against him by fine or imprisonment, and it also appearing that the accused's employer had been informed in advance by the municipal authorities that none of his non-resident employees could be given permits; and that there is a state statute which would have made it criminal for him to complete his application.

(5) Whether as against the due process clause, and the equal protection clause of the federal constitution an ordinance which makes it penal for a private detective to work except with the approval of the chief of police and under police supervision, can be enforced under the circumstances of the particular case, to-wit: one Frank had been convicted for murder; an extraordinary motion for a new trial was pending; the chief of police and the police force under him were assisting in the prosecution of the case; the defendant Frank and his counsel were charging the chief of police and the members of the force with having procured evidence for the prosecution by illegal and criminal methods; the plaintiff in error acted as office manager for a detective agency employed to investigate the alleged illegal and criminal activities of the police officers, and besides exercising his managerial duties he also interviewed some of the witnesses and assisted counsel in the preparation of the motion for a new trial; and it appears that these services could not have been performed, if the ordinance were obeyed, for the obvious reason of the patent incompatibility of working in behalf of the defense and against the police officers, and yet working with

the approval and under the supervision of those very officers who were working in behalf of the prosecution, and whose illegal and criminal activities were the subject matter of the investigation. This question also involves the constitutional right of the defendant Frank to have his assistance in his defense and not to be required to subject his defense to the approval and supervision of his prosecutors, and, as a corollary, the right of the present plaintiff in error to be employed to do the work which Frank had the constitutional right to have done for him.

HOW THE QUESTIONS ARISE.

These questions are involved and the manner in which they are raised is as follows:

Lehon, the accused, was convicted in the recorder's court of the City of Atlanta for a violation of Sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta for "carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective, without being approved by the chief of police or board of police commissioners as required by the sections of the city code cited above" (transcript, p. 2).

THE ORDINANCES IN QUESTION.

Copies of the sections of the city code in question are in the record (transcript, pp. 35, 36) and are as follows:

> "Sec. 2024. **Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.**—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm, or corporation has been first recommended for license or per-

mit for such detective business or agency by the Board of Police Commissioners of said city; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said city, outside of the police force of said city, and without a license issued as hereinbefore provided for, shall be punished by a fine of not exceeding five hundred dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

Sec. 2025. **Detective Agency—Bond Required—Use of Persons Injured By.**—All persons, firms or corporations, licensed under authority of the Mayor and General Council, for the purpose of operating a detective agency, or following the occupations of detective, shall give a bond in the sum of $1,000, payable to the City of Atlanta, for the use of any person, firm or corporation, injured or damaged on account of any illegal act of such agency or detective or persons employed as detectives by such licensed agency, or detective or any employee in and about their business licensed as aforesaid."

Sec. 2026. **Penalty.**—Any person, firm or corporation carrying on a detective agency or following the occupation of detective, without giving bond as required in the foregoing section, shall, on conviction in the Recorder's Court, be punished by a fine not exceeding $500.00 or sentenced to work on the streets or public places of the city, not exceeding thirty days, either or

both penalties to be inflicted in the discretion of the Recorder."

"Sec. 2027. **Certificate as to Character.**—No detective agency now or hereafter licensed by the City of Atlanta, shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners, and the Chief of Police, and a certificate to that effect lodged with said agency."

"Sec. 2028. **Penalty.**—Any detective now or hereafter licensed by the City of Atlanta that sends out any person or agent to do detective work without the approval provided in preceding section of this ordinance shall thereby forfeit the license granted for such agency, and if it thereafter continues said detective agency, any person, agent or officer or manager of such agency shall, on conviction in the Recorder's Court of a violation of this ordinance, be fined for each day's operation as a separate offense, not exceeding two hundred dollars, or imprisoned not exceeding thirty days, or forced to work upon the public works not exceeding thirty days, either or all of such penalties to be inflicted in the discretion of the Recorder."

STATE STATUTE IN CONNECTION WITH WHICH ORDINANCES ARE TO BE CONSTRUED.

These ordinances are to be taken in connection with Sections 337 and 338 of the Penal Code, (1910) of the State of Georgia, as follows:

"Sec. 337. **Appointment of Peace-Officers and Detectives.** No sheriff, mayor, or other person authorized by law to appoint special deputy-sheriffs, constables, marshals, policemen, or other peace-officers or detect-

ives, to preserve the public peace or detect crime, shall appoint, as such special deputy, special constable, marshal, policeman, or other peace-officer or detective, any person who is not a citizen of this State, and no person shall assume or exercise such functions, powers, duties, or privileges incident and belonging to the office of special deputy-sheriff, special constable, marshal, or policeman, or other peace-officer or detective, without first having received his appointment in writing from the lawfully constituted authorities of the State.

"Sec. 338. **Acting as Peace-Officer Without Authority.** Any person who shall, without authority, exercise or attempt to exercise the functions of, or hold himself out to anyone as, a deputy-sheriff, marshal, policeman, constable, or other peace-officer or detective shall be guilty of a misdemeanor; Provided, that nothing in this Article shall be construed to interfere with the police powers granted to conductors of passenger trains. Nor shall this and the preceding section apply in times of riot or unusual disturbance, or in other instances provided for by law."

The accused filed a special plea setting up the unconstitutionality of the ordinances. The trial court struck the special plea on general demurrer to the same on the ground that it was insufficient in law. (Transcript, p. 2).

The accused thereupon followed the statutory method of review, that is by presenting a verified petition for certiorari to a judge of the Superior Court, and, upon his endorsing refusal of sanction thereon, taking bill of exceptions and writ of error to the Court of Appeals. The Court of Appeals affirmed the judgment. Under the Georgia practice when this proceeding is taken, the facts stated in the verified petition for certiorari are judicially taken as the truth of the case; hence the case may be considered

as being here on undisputed facts; and this is especially true where the trial court struck the special plea on general demurrer, it being presumed in such cases that if the plea had not been stricken and the accused had been given opportunity to do so he would have proved all the facts as pleaded, and that therefore, for the purposes of the questions involved, the opposite party admits all facts stated in the plea to be true. (For a statement of the practice and the presumption as to the truth of the case as claimed by the accused, see Linder vs. Renfroe, 1 Ga., App. 58; Marks vs. State, 8 Ga. App. 283.)

THE FACTS.

The facts briefly stated are as follows:

Lehon was a resident of Louisiana, being the manager of the Southern Division of the Wm. J. Burns National Detective Agency, with headquarters in New Orleans. That Agency was duly licensed in Atlanta, the license being taken in the name of one Sears, a citizen of Atlanta, it being understood, however, at the time that he was taking it as local manager of the Burns Agency, (Transcript, pp. 11, 13, 22, 36, 37, 39).

Lehon came to Atlanta to assist the Burns Agency in the defense of one Leo M. Frank, charged with murder; the work he did being the general supervision of the local office, the employment of operatives, and the checking up with the witnesses certain testimony alleged to have been given by them in connection with the case, and to give assistance to defendant's counsel in the preparation of the case.

He exercised none of the functions of a police officer; nor any of the sleuth work of an operative detective.

He did not apply for or secure the approval of the chief of police or the police board, nor did he report to the chief of police as required by the ordinances.

THE OATH REQUIRED BY THE ORDINANCES.

He did not, therefore, take the oath prescribed in Section 2024 of the city charter, which oath is found in the charter of the City of Atlanta (an act of the general assembly of the State of Georgia of which the courts take cognizance) i. e., in Georgia Laws 1874, p. 135, section 37, which is to be taken in connection with section 38 of the same statute, as follows:

> "Sec. 37. They shall take an oath, faithfully and impartially to discharge the duties imposed on them by the laws of the State, and the ordinances of the City, and shall give such bonds as may be required of them by the City ordinances."

> "Sec. 38. It shall be their duty to make arrests of any persons violating the ordinances of said City, with or without summons, and also with or without warrant. They shall likewise make arrests of any persons who have violated the statutes of said State, and their arrests for such violations are hereby authorized, either with or without warrants therefor. They shall perform such other duties as may be imposed by the laws of the State, and ordinances of the General Council."

SUMMARY OF THE SPECIAL PLEA.

This special plea made the point that the ordinances are void on the following grounds in substance, (omitting those which do not involve federal constitutional questions):

That the right to act as a private detective or to run a detective agency is a valuable property right, also a right of personal liberty, and this is especially true when the activities are employed on behalf of one accused of crime; that the ordinances, when construed together, absolutely

prohibited the occupation; and that this was especially true as to the activities for which he was being tried, namely acting as an investigator on behalf of one accused of crime where the police force of the city were prosecutors and where the particular matter under investigation was the alleged illegal and criminal methods used by the police in the procurement of evidence in that case; and that the requirement that he should take the oath of a policeman, be approved by the chief of police and work under police supervision, and report to the chief of the police would render his task impossible.

That he is a citizen of Louisiana, and that under the ordinances, taken in connection with the State law, and as construed by the police commission, under an unbroken practice of that board, he could not be given a permit because the board had ruled and had enforced the ruling, that none but citizens of Georgia could be licensed as private detectives. That the ordinance was, therefore, void as depriving him of liberty and property without due process of law, denying him equal protection of the laws, and refusing to him as a citizen of Louisiana privileges and immunities granted to citizens of Georgia. These same points in substance arise under the evidence.

THE UNDISPUTED FACTS.

There is no dispute or contradiction in the record as to these facts.

The accused acted only as a private detective, i. e., as one who did office work in checking up the reports of operative detectives and who in some cases in person interviewed and obtained statements from witnesses. His chief duty was to assist defendant's counsel in the preparation of the evidence in the case of Leo M. Frank (transcript, p. 18).

That the accused did not act or assume to act as a pub-

lic detective. He did not exercise or assume to exercise any function as a police officer or as a peace officer.

That the accused is a citizen of Louisiana.

That the police commissioners of the City of Atlanta have construed the law as prohibiting them from granting any permit, license or recommendation to any detective, public or private, unless he be a citizen of Georgia. This is admitted by the demurrer to the special plea (see transcript, p. 34) and is shown by the testimony of the police commissioners themselves (transcript, pp. 21-23). The testimony of the chief of police shows that he likewise construed the ordinances (see transcript, pp. 18, 19).

That while the accused had not personally made application to the commissioners for a permit or to the chief of police for his approval as a private detective, the Burns Agency of which he was an employee, had been notified in advance of the board's construction of the ordinances, and of the fact that no permit could be issued to him unless he became a resident of the City of Atlanta. (See Exhibit "H" to the testimony, transcript, pp. 38-41, and testimony of commissioner Johnson, transcript, pp. 22, 23.)

That the chief of police and the other members of the police force of the City of Atlanta were actively assisting the prosecution in the case of Leo M. Frank.

That one of the principal matters involved in the investigations being made by and under the direction of the accused was certain alleged illegal and criminal methods that had been used by these police officers in procuring evidence for the State.

That compliance with the ordinances would have rendered the performance of this service futile, if not impossible, since the ordinances required the disclosure to the chief of police of the activities of all private detectives and required them to work under the supervision of the police. It is obvious that an investigation of illegal and criminal practices of the chief of police and his police officers could not be made effectively under the supervision of the very

men who were accused of the illegal and criminal practices; and it is so alleged in the special plea and shown in the evidence.

The exceptions to the overruling of the special plea, and the other exceptions made by the assignments of error in the petition for certiorari present certain constitutional questions, which, however, are so far as this court is concerned, set out in the assignments of error presented in connection with the writ of error from this court, and which therefore are not repeated here.

THE HOLDING OF THE STATE COURT OF APPEALS.

The Court of Appeals held:

That the ordinances do not conflict with either state or federal constitution.

That although the ordinance had the effect to make it impossible for any private person to carry on the business of a private detective, the ordinance was nevertheless valid, on the ground that the municipality had the power to prevent interference with its police department.

That irrespective of the terms of his employment a detective is in essence a quasi police officer, and subject to municipal control.

That the right of the municipality in these respects is superior to the property right of the individual to engage in the occupation, and that, therefore, to prohibit the occupation is not to deprive the individual of property or liberty in violation of the due process of law clause of the federal constitution or to deny him the equal protection of the laws.

That the court would not pass upon whether the police commissioners could grant a permit to a non-resident, nor upon the question as to whether the uniform rule and practice of the police commissioners in refusing permits to non-residents discriminated against the plaintiff in error

as a citizen of Louisiana, since he had not made application for a permit.

That under the evidence his activities were such as to make him a detective within the purview of the ordinance.

SPECIFICATON OF THE ERRORS RELIED UPON.

The following errors are relied upon:

I.

That the Court of Appeals of the State of Georgia erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari presented by the plaintiff in error, seeking to review and set aside the conviction of the plaintiff in error in the recorder's court of the City of Atlanta, on the ground that the ordinances of the City of Atlanta were and are void and unconstitutional in that the enforcement of said ordinances deprived said plaintiff in error of his liberty and property without due process of law, and also in that they denied to him the equal protection of the laws, (thereby being repugnant to the fourteenth amendment of the Constitution of the United States) and in that the enforcement of said ordinances denied to plaintiff in error, who was a citizen of the State of Louisiana, privileges which were allowed to citizens of the State of Georgia, namely the privilege of engaging in the work of a private detective, (thereby being repugnant to and violative of paragraph 1, section 2 or article 4 of the Constitution of the United States) and that the decision and judgment of the Court of Appeals of Georgia was, therefore, violative of and repugnant to the Constitution of the United States, and especially the portions thereof referred to above.

II.

The said court erred in holding and adjudging that the municipal ordinances of the City of Atlanta under which the plaintiff in error was convicted in the recorder's court of the City of Atlanta were not and are not, as applied to the plaintiff in error in the present case, unconstitutional, null and void because they were and are repugnant to and violative of the fourteenth amendment of the Constitution of the United States for the reason that the said ordinances and the enforcement thereof deprived the plaintiff in error of his liberty and property without due process of law, and denied to him, as a person within the jurisdiction of the State of Georgia, the equal protection of the laws.

III.

That said court erred in holding and adjudging that the making and enforcement of the municipal ordinances of the City of Atlanta under which the plaintiff in error was tried and convicted in the recorder's court of the City of Atlanta were not and are not violative of and repugnant to paragraph 1, section 2 of article 4 of the Constitution of the United States which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

IV.

That the said court erred in holding and adjudging that no defense was presented by special plea filed by the plaintiff in error in the recorder's court of the City of Atlanta, wherein the plaintiff in error specifically set up and pleaded that the ordinances of the City of Atlanta under which he was accused were unconstitutional, null and void in that they deprived him of his liberty and property without due process of law, and denied him the equal protection of the

laws, also in that they deprived Leo M. Frank, the person on whose behalf the plaintiff in error was acting in the transaction for which he stood charged, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; also in that they abridged the privileges and immunities of plaintiff in error who was a citizen of the State of Louisiana, and of the United States, in that said ordinances denied to him the privileges and immunities enjoyed by citizens of the State of Georgia likewise circumstanced; and also that the enforcement of said ordinances, under the facts in said special plea recited, (and by the demurrer thereto admitted to be true), deprived the plaintiff in error and also said Leo M. Frank, for whom he was acting as aforesaid, and each of them, of their liberty and property without due process of law, and denied to each of them the equal protection of the laws and abrigded the privileges and immunities of plaintiff in error as a citizen of the United States and discriminated against him as a citizen of another State by refusng to him the privileges to which the citizens of the several States were entitled and which in the enforcement of said ordinances were so limited as to be enjoyed only by citizens of the State of Georgia, and in adjudging and holding that said special plea was insufficient in law; and that the said Court of Appeals erred in sustaining the action of the recorder of the City of Atlanta in striking and dismissing said special plea as being insufficient in law.

V.

That said court erred in holding and deciding that the right guaranteed to the plaintiff in error by paragraph 1, of section 2 of article 4 of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states," had not been denied to him in the enforcement of the ordinances of the City of Atlanta

under which he was tried and convicted in the recorder's court of the City of Atlanta; notwithstanding he was charged with having acted as a private detective in the City of Atlanta without having been approved by the Chief of Police of said City of Atlanta and without a permit from the Police Commissioners of said city, and it appeared that the plaintiff in error was a citizen of the State of Louisiana, and that under the views of the law as held by the Chief of Police of Atlanta, he approved only citizens of Georgia as private detectives, and under the views of the law was held by the Police Commissioners, and their uniform course of practice, said Commissioners granted permits only to citizens of the State of Georgia to act as private detectives.

VI.

That the court erred in affirming the judgment of the Superior Court of Fulton County in refusing to sanction the petition for certiorari of plaintiff in error, brought to review and reverse the judgment of the recorder of the City of Atlanta, convicting him of violating the ordinances of said city by carrying on a private detective agency and doing the business of a private detective in that the court held that the acts shown by the evidence to have been done by the plaintiff in error (in substance that he as a managing agent or supervisor of a private detective agency, which through another agent had been duly licensed and granted a permit to do business in Atlanta assisted the defendant in a criminal case and his attorneys in the preparation of an extraordinary motion for a new trial, by openly, and not secretly, interviewing the witnesses who had made and who were about to make affidavits for use in said case, and by acting as a go-between or as a channel for conveying information to and from the defendant's counsel and the detective operatives employed on the case by the employer of the plaintiff in error) came within the purview of the said ordinances, and in that the court, in connection with

this construction of the ordinances, held that the ordinances so construed and enforced against said plaintiff in error did not deprive him of his liberty and property without due process of law.

VII.

That the court erred in holding that the ordinances of the City of Atlanta under which the plaintiff in error was convicted are not and were not void and unconstitutional as supplied to the transaction for which the plaintiff in error was convicted, in that they deprived the plaintiff in error of his liberty and property without due process of law and denied the equal protection of the laws to him, and also in that they deprived the person for whom plaintiff in error was employed and acting, namely Leo M. Frank, a prisoner charged with and convicted of murder with a motion for new trial pending, of life, liberty and property without due process of law, and denied to him the equal protection of the laws; and in sustaining the enforcement of said ordinances against the said constitutional provisions, notwithstanding that it became necessary and important to the defense of said Leo M. Frank against the charge aforesaid that he employ said plaintiff in error to perform for him the services which said court held to constitute engaging in the business of a private detective within the purview of said ordinances, and notwithstanding it appeared that the Chief of Police of Atlanta (whose approval under said ordinances was a condition precedent to the plaintiff in error being permitted to perform said services and under whose supervision the plaintiff in error would have been compelled to perform said services, if he had complied with said ordinances) was prosecutor in the said case against said Leo M. Frank, so that said services could not have been performed for said Leo M. Frank if the plaintiff in error had complied with said ordinances, and notwithstanding the effect of said ordinances was to com-

pel the defense in said case of Leo M. Frank to disclose its activities in preparing its evidence to the prosecutor without requiring the prosecution to make like disclosure to the defendant; and especially so since the chief object and need of the employment of the plaintiff in error was to prepare the evidence as to alleged illegal methods used by said Chief of Police, the prosecutor, and those working under him in procuring and presenting evidence against said Leo M. Frank in said matter.

ARGUMENT.

ANALYSIS OF THE ORDINANCES.

Notwithstanding the circuitous route taken by the ordinances in question to reach the end in view, their object and purpose are frankly stated in the title to the first of them (City Code, Section 2024) as follows: "Detective Agency Business Abolished".

The abolition of the business of private detectives is accomplished by requiring a license or permit from the police commissioners and by requiring the licensee to take the oath of a city detective and to be subject to police supervision. This ipso facto and at once converts the private detective from a private detective into a police and peace officer of the city. A reading of the oath, and the statement of the duties thereby assumed, both of which are set out in full in the preceding statement of facts show undoubtedly that this is correct.

The meaning and effect of the ordinances would have been exactly the same if it had been directly enacted under penalty that "none but public officers of this city who are appointed, licensed or permitted by the Board of Police

Commissioners, and who have taken oath as such and duly given bond, and who work under police supervision shall do the work hitherto done by private detectives and private detective agencies, and all other persons are forbidden to follow the occupation of a private detective."

DEFINITION, BY CONSTRUCTION, OF THE WORDS, "PRIVATE DETECTIVE."

The phrase "private detective" has no clearly defined meaning, but for the purposes of this case it has been defined to the extent that it includes one who exercises no public function, who exercises none of the functions of a peace or police officer, but who only does managerial office work, interviews witnesses and reports to counsel—the work of an ordinary investigator; in fine, the same character of work that the chief claim agent of a railroad company or other corporation would do—because this point was expressly made that these activities did not constitute one a private detective within the purview of the ordinances, and was decided against by the Court of Appeals of Georgia.

THE OCCUPATION, AN ORDINARY LAWFUL CALLING.

The occupation of private detective, especially as defined in this case, is a lawful calling. It is so in its nature, and is so recognized by the statutes of Georgia. The general tax act of the State of Georgia, found in Civil Code of Georgia (1910) section 931 taxes it as an ordinary occupation in the following language:

> "Upon each and every person doing detective work, or engaging in the business of a detective for hire or compensation, the sum of ten dollars for each located office established in this State, and if no established office, then said tax shall be required in each county in

this State wherein any detective may do or offer to do detective work."

In Georgia the taxing of a business in the general tax act carries the conclusive implication that it is a lawful occupation. Miller vs. Shropshire, 124 Ga. 829.

> "The general tax acts * * * * are purely revenue measures, though enforceable by penalty for failure to pay the imposed tax, as distinguished from police measures designed to regulate internal affairs."
>
> Miller vs. Shropshire, Supra., p. 832.

The right to engage in the business of a private detective is in its very nature a valuable property right—a reputable means of earning a livelihood.

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may chose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one in like conditions. The interest, or as it is sometimes termed, the estate acquired in them, that is the right to continue their prosecution is often of great value to the possessor, and cannot be arbitrarily taken from them any more than real or personal property can thus be taken."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed. 623, 625.

See also the valuable monographic note appended to the case of State vs. Hinman, 65 N. H. 103, as reported in 23 Am. St. Rep. 22, 25.

The occupation pursued by the plaintiff in error, as characterized by the acts he did, call it what you may, is a plain, common ordinary business.

> "There is no magic in language, though used by a constitutional convention, which can change a private business into a public one. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare by organic act or legislative ordinance that such place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation." Per Mr. Justice Field, dissenting in Munn vs. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77, 88.

The ordinances here involved are not regulations of a business, but as has been pointed out are absolute prohibitions.

THE CONSTITUTIONAL RIGHT TO FOLLOW A LAWFUL CALLING.

The right to pursue any lawful calling is, of course, a right protected by the federal constitution.

Allgeyer vs. Louisiana, 165 U. S. 578. 41 L. Ed. 832.

There is no intention on the part of the plaintiff in error to argue that the State cannot regulate business, or in some cases abolish or suppress occupations or create monopolies in certain occupations, or that the consent of some board or officer may not lawfully be made a condition precedent to individuals engaging in certain businesses.

We understand the rule to be that the fourteenth amendment of the federal constitution guarantees the citizens against arbitrary spoliation of property rights in private occupations, and guarantees equal protection to all simi-

larly situated; that no general and unlimited power resides in the State legislative bodies to regulate purely private business, except wherein it is affected with some public interest; that the means employed must not be unreasonable and unnecessary to the accomplishment of such lawful purpose as might justify legislation on the subject; that the interference with private business must not be arbitrary; that while the State may as to some occupations create a monoply this does not relate to purely private occupations; that in all cases the exercise of the police power is subject to the supervision of the courts.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220;

Dobbins vs. Los Angeles, 195 U. S. 223, 49 L. Ed. 169;

Lawton vs. Steele, 152 U. S. 133-137, 38 L. Ed. 385 388.

"The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Connally vs. Union Sewer Pipe Co., 184 U. S. 540. 558, 46 L. Ed. 679.

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of action of purely personal and arbitrary power."

Yick Wo vs. Hopkins, 118 U. S. 356, 369, quoting ap-

provingly in Chicago M. & St. P. Ry. Co. vs. Tompkins, 176 U. S. 167, 172, 44 L. Ed. 417.

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. Los Angeles, 195 U. S. 223, 236, 49 L. Ed. 169.

"But this concession (that certain businesses may be regulated) does not in the slightest degree affect the proposition, which I deem a fundamental one, that the ordinary pursuits of life, forming the large mass of industrial vocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, the liberty of pursuit."—Concurring opinion in Butchers Union Co. vs. Crescent City Etc. Co., 111 U. S. 746, 763; 28 L. Ed. 585, 589.

THE ORDINANCES, NOT AN EXERCISE OF THE POLICE POWER.

Even though the subject be one as to which the exercise of the police power is legitimate, the exercise must be had with due regard to constitutional rights and the regulation

must have relation to the end for the accomplishment of which the exercise of the police power is authorized. Under the guise of accomplishing some object within the police power the law making body cannot adopt regulations which are not legitimately adapted to that end and which infringe constitutional guarantees.

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Whatever may be the supposed evil arising from leaving private detectives unregulated, the regulation must be directed toward that evil and not something else. If the object be to confine the business to persons of good character, that object is not accomplished by making the detectives take an oath to assume the duties of a public police officer; or by a regulation which confines the business to residents of the State. The question of the proficiency of a private detective would seem to be a matter in which the public is not concerned and with which only the private detective and his employer are concerned; but even if it is, the regulation in question is not designed to that end, except in the minor detail that no detective agency shall employ a private detective unless the latter's proficiency is approved by the chief of police. The detective agency probably would be a better judge of what type of man it needed than the chief of police. The activities of private detectives might be curbed by uniform regulations, but it is arbitrary to curb them by the requirement that regulates them only by putting them under the undefined, unrestricted, supervision and control of the police commission and the chief of police of the city.

When the ordinances are construed as a whole, especially in connection with the state statute with which they must be construed, and are carefully studied to ascertain the object in view in their passage, the conclusion irresistably forces itself on the practical mind that the only intent and purpose (theoretical or practical) of the ordinance was to

drive out of the business all detective agencies which would not co-operate with the police of the city, and do the bidding of the police authorities; first, by providing for police approval, then for the putting of every detective under the oath of allegiance, then for subjecting his activities to police supervison; also to exclude all non-residents from the business. The ordinances cannot fairly be construed as compatible with any other legislative design. And the evidence discloses that in practical operation they were given that effect.

If the phrase "private detectives" had been construed by the state authorities as including only those who exercised some function likely to affect public safety, good order or morals, the ordinances, on their face, (oppressive as they are) might not be so unreasonable or arbitrary as to justify judicial interference. For instance, private persons are sometimes employed to act as guards for individuals who are in danger of private violence, or as protectors of property in case of strikes, etc., and they undertake to make arrests for offenses committed in their presence, and to perform other services akin to those pertaining to peace and police officers. To place such activities under police supervision might be reasonable.

But here the occupation pursued has no relation to public safety, good order or morals or any of the other wards of the police power. The state authorities and the State Court of Appeals construe the ordinance as including this occupation. To regulate this business by the abolishment of it, and to transfer the sole right to pursue it to those licensed, sworn and supervised as public police officers, would seem to be purely arbitrary; it would appear that the regulation is neither reasonable nor necessary to any object legitimately to be accomplished in the exercise of the police power; that it creates a monopoly in a purely private business which the State would not have the power wholly to suppress.

MERE DEFINITION CANNOT TAKE AWAY CONSTITUTIONAL RIGHT.

At this point in the argument we call attention to a proposition which is involved not only in the question immediately under discussion, but also in practically all of the other questions in the case:

The proposition is, that any enactment which is not a legitimate and constitutional police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted in a context which professes a purpose which would be the proper object for the exercise of that power.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441.

In the Coppage case, just cited, the Kansas statute professed to be an act to penalize the coercion of employees. The act penalized the coercion by employers or would-be employers of employees or applicants for employment as to agreeing not to join labor union as a condition to the employment or continuing in the employment.

The Kansas Court held that one who presented to his employee a written agreement to withdraw from a labor union, but left it optional with the employee whether he would sign or quit work was guilty under the act. The United States Supreme Court, held that the fact that the statute uses the word "coerce" or that the Kansas Supreme Court stresses that word in its opinion is immaterial; that since the state court treated the term "coerce" as applying to the only activities engaged in by the accused, the effect was to construe the statute as including these activities and to enforce it so as to prohibit them; "there being no finding nor any evidence to support a finding that the plaintiff in error was guilty in any other sense," that the Court would examine the evidence to the extent necessary in order to determine the federal question asserted.

The Court also said:

> "If the right that the plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term 'coercion'."

The court again reiterates, "to avoid possible misunderstanding," that the purpose declared in the title of the acts is immaterial—that "this court deals not with moot cases of abstract questions, but with the concrete case before it."

The court declared the statute unconstitutional as applied to the transaction in question.

Now in the case at bar we contend that under the guise of regulating peace and police officers, the municipal legislative body could not include in the enactment one who pursued an ordinary avocation having no relation to the functions of peace or police officers by calling him a "detective;" that the Court of Appeals having held that a detective is a peace officer "whatever may be the terms and purposes of his employment;" and "there being no finding nor evidence to support a finding that the plaintiff in error was guilty in another sense" than that he engaged in the non-public activities referred to; and the entire evidence being in the record, the Court will examine it to the extent necessary in order to determine the Federal right that is asserted; and that if the right that plaintiff in error exercised is founded upon a constitutional basis, the Court will protect it against impairment, notwithstanding its inclusion by the State authorities or courts in a false definition, or in an enactment which as to activities of another nature may be valid exercise of the police power.

THE DISCRIMINATION AGAINST PLAINTIFF IN ERROR ON ACCOUNT OF HIS CITIZENSHIP.

Thus far we have discussed the ordinances without regard to the question of discrimination between residents and non-residents, because the present case is a test case on which certain other cases depend in which the question of non-residence is not involved.

When we go a step further and get to the real object and result of the ordinance, namely, to prohibit all but residents of Georgia from doing private detective work of all kinds, the invalidity of the ordinance becomes, we submit, perfectly clear.

The State can of course prescribe that none but residents can hold public office in the State; but it is respectfully insisted that the State cannot lawfully prescribe that none but its own citizens who are public officers can carry on a purely private business.

For example, shoemakers are frequently justices of the peace, and vice versa. The State may lawfully prescribe that none but its own citizens may be justices of the peace; but it cannot then, without violating paragraph 1, of section 2 of article 4 of the Constitution of the United States, go further and prescribe that none but justices of the peace may be shoemakers.

The State of Georgia, through sections 337 and 338 of the Penal Code of 1910 (quoted in full in the abstract and statement of facts incorporated in this brief) has provided that none but citizens of the State may exercise any of the functions of "deputy-sheriffs, constables, marshals, policemen, or other peace officers or detectives, to preserve the public peace or detect crime". The word "detective" used in this statute, by its association, plainly means "public detective"; and, as this word, as used in this statute, has never been otherwise construed by the Georgia courts, we assume this court will adopt that construction. So construed, this statute is conceded to be lawful. But when,

following this statute, the city of Atlanta enacts that no one shall follow the occupation of private detective (and includes in the enactment by construction the purely private activities involved in the present case) who is not licensed and sworn as a public police officer working under police supervision, the unlawful discrimination against the non-resident is at once effective.

To state the proposition a little differently and in the concrete: Lehon is a citizen of Louisiana, under the protection of the constitutional guarantee that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; he is a managerial officer in a detective agency, performing purely private functions; he wishes to pursue his business in Atlanta in the State of Georgia; in attempting to do so he finds a local ordinance that for him to do so he must first become a public officer and be appointed and qualified as such, and must perform his businesses as such; he also finds a statute of the State of Georgia making it criminal for him to become such an officer by reason of his non-residence; citizens of Georgia may qualify to pursue the occupation, he may not because he is a citizen of another state. The discrimination intended by the ordinance, though somewhat indirectly effectuated, is nevertheless perfectly patent and well accomplished except for the constitutional guarantee which avoids the ordinance.

> "It is undisputably the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions."
>
> Dent vs. West Virginia, 129 U. S. 114, 121, 32 L. Ed., 623, 625.

"In all cases of the class to which this one before us

belongs it is a test question whether there is any discrimination in favor of the State or of citizens of the State which enacted the law. Whenever there is such discrimination it is fatal."

Howe Mach. Co. vs. Gage, 100 U. S. 676, 25 L. Ed. 755, 756.

Even in the exercise of the police power there must be no discrimination between residents and non-residents.

Webber vs. Virginia, 103 U. S. 344, 26 L. Ed. 565.

Even as to intoxicating liquors the rules applies.

Walling vs. Michigan, 116 U. S. 446, 29 L. Ed. 691;

Scott vs. Donald, 165 U. S. 58, 41 L. Ed. 632;

Vance vs. Vandercook, 170 U. S. 438, 42 L. Ed. 1100.

Statute prohibiting a non-resident from being a trustee void.

Roby vs. Smith, 131 Ind. 346, 31 Am. St. Rep. 442, 15 L. R. A. 792.

The principle is recognized in Georgia.

Gould vs. Atlanta, 55 Ga. 678 (1);

Atlanta vs. Jacobs, 125 Ga. 523 (1).

THE PLAINTIFF IN ERROR NOT PRECLUDED FROM RAISING THE QUESTION.

There is no dispute in the record that this discrimination exists, or that the police commissioners, to whom application for permits must be made, or the chief of police,

whose approval is necessary, had uniformly refused permits and approval to non-residents, they having construed the ordinance, taken in connection with the state penal statute on the subject, as forbidding the issuance of permits and approvals to non-residents. Counsel for the City took the position, and doubtless will urge it again, and the Court of Appeals of Georgia in its decision sustained the contention, that the plaintiff in error is not in a position to make the question because he made no application to the police commissioners or to the chief of police for permit or approval. They rely upon the proposition (perfectly sound when properly applied) announced in Gundling vs. Chicago, 177 U. S. 183, and recognized in a number of other cases, that where a statute makes the permit of an officer or tribunal a condition precedent to one's engaging in an occupation, one who has not applied for a permit, cannot make the point that the officer or tribunal is vested with an arbitrary discretion to refuse.

The present case is clearly without the reason given in those cases, and is, we submit, not within the rule.

Here all the valid parts of the ordinance (if any parts were valid) were complied with. The state, county and municipal license taxes were paid by the agency upon whom they were imposed. This puts the plaintiff in error in position to make the question. See—

Campbell vs. Thomasville, 6 Ga. App. 212 (18), 238.

THE STATE LAW MADE IT CRIMINAL FOR THE PLAINTIFF IN ERROR TO COMPLY WITH THE ORDINANCE.

However, the most cogent reasons why the plaintiff in error is excused from attempting to comply with the ordinances are these:

(1) Application on his part would be futile—an idle thing—because the police commission and the chief of police

had a uniform rule and practice, known both to them and communicated to the employer of the plaintiff in error, that no permit would be granted to a non-resident. Tender is always excused when the person to whom the tender is to be made has in advance formed and announced an intention to refuse.

(2) **Compliance with the ordinance on the part of the plaintiff in error would have been a crime on his part under the laws of the State of Georgia.** The license or permit could not be issued to him unless he contemporaneously took the oath of a city detective; and he could not take the oath (being a non-resident) without violating the provisions of Sections 337 and 338 of the Penal Code of Georgia (already quoted in full); which forbid that any, except citizens of Georgia, "shall **assume** or exercise such functions, powers, **duties** or privileges."

The ordinances, read in connection with the State law, embrace a legislative scheme by which no license or permit can be issued to a non-resident. The police commissioners and the chief of police so construed them, and properly so. The ordinances do not in express words forbid a non-resident from applying for a permit; but do enact such a legislative scheme as to forbid such an application.

It is not a case of an ordinance good in part and bad in part, where the bad can be separated from the good, and still leave a sufficiency of the legislative scheme intact to be enforced. If the main and pervading legislative object cannot constitutionally be accomplished, the ordinances fail as a whole, are of no force and effect, and no person is called upon to obey them in whole or in part; and no person should be punished for not obeying them.

VIOLATION OF CONSTITUTIONAL RIGHTS THROUGH THE ENFORCEMENT OF THEM, UNDER THE PARTICULAR CIRCUMSTANCES.

Coming now to the sixth question proposed at the beginning of this brief, we take up the proposition whether the enforcement of the ordinances under the particular circumstances of the present case were not violative of the due process and equal protection clauses of the federal constitution.

A statute, though fair on its face, may not be enforced if under the circumstances of a particular case it would deprive a person of life, liberty or property without due process of law or deny him the equal protection of the laws.

> Yick Wo vs. Hopkins, 118 U. S. 356; 30 L. Ed. 220;
>
> Dobbins vs. Los Angeles, 195 U. S. 223, 240, 49 L. Ed. 169.

To act as investigator for the defense in a criminal case and be under the supervision of the prosecutors in the case; to investigate the illegal and criminal activities of the police under the supervision of those charged with the illegal and criminal activities, are absurdities. To regulate the business of attorneys at law is probably a fair exercise of the police power, but to provide that the attorney for the accused in a criminal case should conduct the defense under the supervision of the prosecuting attorney would be abhorent to our sense of justice, as well as to the federal constitution.

> "Under our system the **people**, who are the subjects, are the sovereigns. Their rights, whether collective or individual, are not bound to give away to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in

power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered."

U. S. vs. Lee, 105 U. S. 196, 208, 27 L. Ed. 177.

The right to defend one's self against a criminal charge is a right protected by the federal constitution.

The right to defend one's self in the courts involves the right to employ all necessary and legitimate means to make that defense successful; and the right to employ others to assist in the defense, involves as a corrolory the right of those so employed to be employed and to perform the employment.

The right of both the government and of the accused to prepare for prosecution or defense, as the case may be, is an inherent right, and is one which is to be freely exercised without molestation.

In re, Quarles, 158 U. S. 532, 39 L. Ed. 1080.

The Quarles case decides the specific proposition that the right of the citizen to assist in the prosecution of a criminal case is one of his fundamental rights which is within the protection of the constitutional guarantees, but this holding is based on the proposition that the citizen has the same rights as to prosecution that he would have as to defense, and upon the implication that no one would deny that every citizen has the right to defend himself freely in the courts, and to have others to assist him with like freedom and protection,—that these are fundamentals embraced in the very covenant of government.

The proposition that Lehon had the free right to make an adequate and untrammeled investigation of the illegal acts of the police against his employer is directly settled by the decision. This right, so the case holds, neither state nor city, could abridge, but, on the contrary, should protect.

It is submitted that to require that Leo M. Frank should not defend himself against the charge of murder, or perfect his extraordinary motion for a new trial by proof that the evidence obtained against him was not credible because of the illegal and criminal means employed to obtain it, except upon the condition that those employed by him to make the necessary investigations which he could not make, being in jail, should work and investigate under the supervision of those who were prosecuting him, would be to deprive him of his life or liberty without due process of law; and would be to deny him the equal protection of the laws. As a corrolary to this proposition, the constitutional provisions protects those employed to do the work.

But it is said that no one may assert another's constitutional rights in his own behalf. Where there is no privity or community of interest this is generally true; but like all good rules it has its exceptions.

We apprehend that if a statute were passed requiring a sheriff, under penalty, to hang, without trial, a person indicted for a certain crime; and the sheriff should refuse to obey the law, and the penalty were about to be enforced against him he could assert the unconstitutionality of the statute on the ground that its enforcement would deprive the person required to be hanged without trial of his life without due process of law.

In the case of Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, the court having reached the conclusion that the statute of Louisiana could not limit the contractual powers of a person in another state, held also that the statute could not reach one who in Louisiana did an act to make that contract effectual; in other words, Allgeyer was allowed to set up the constitutional privileges of his non-resident correspondent.

The right of the prisoner to take the necessary means for his full and proper defense, begets in the person employed as being necessary to the successful prosecution of that defense a like right to do the acts which are appro-

priate to the defense, and both of these are rights which are protected by the Fourteenth Amendment of the Constitution of the United States.

Logan vs. United States, 144 U. S. 263, 36 L. Ed. 429;

In re, Quarles 158 U. S. 532, 39 L. Ed. 1080;

In re, Yarbrough, 110 U. S. 651, 28 L. Ed. 274.

These cases are cited, not for the ultimate and specific proposition which they decide, namely, that the Federal Government can protect, by affirmative penal legislation, those rights which are conferred, either expressly or by implication, by the Constitution, but because all of them hold that where a major right exists the protection of that right includes as a necessary consequence the protection of all rights subsiduary and ancillary to it. That is to say, as applied to the case at bar, it being unconstitutional to deprive a prisoner of the right to defend himself in the courts by all adequate and proper means and to employ others where necessary to aid him in his defense, it is likewise unconstitutional to deprive the persons whom it is necessary for him to employ for that purpose of the right of accepting and properly executing the employment. In other words, to deprive Leo M. Frank of the right to defend himself from the charge of murder and to employ detectives to make lawful investigations for him would be to deprive him of the rights guaranteed by the fourteenth amendment of the Federal Constitution; and it follows that this right as a major right includes, with like protection, the subsidiary right which, as a corrollary, flowed to the detectives, of accepting and executing that employment.

REPLY TO POSITION TAKEN BY DEFENDANT IN ERROR.

While the preparation of this brief was in progress counsel for the defendant in error has served copy of a

motion to dismiss and affirm and a brief in connection therewith. Some of the propositions therein submitted are already covered by the foregoing brief, but some of them are new.

In the brief of our opponents on the motion to dismiss (p. 7) the position is now taken that since the Burns Agency, through its local representatives, had a permit from the police commissioners, all that Lehon would have had to do to comply with the ordinance was to be approved by the chief of police—this under Sec. 2027 of the City Code. That section provides:

> "Sec. 2027. Certificate as to Character.—No detective agency now or hereafter licensed by the city of Atlanta shall send out or employ for detective work any person or agent whose character and proficiency has not been approved by the Board of Police Commissioners and the Chief of Police, and a certificate to that effect lodged with said detective agency."

But the only penalty for violation of that section is contained in Section 2028 of the City Code, and is forfeiture of the agency license. Plainly, Lehon was not convicted under that section, since he was punished by fine, with alternative of imprisonment under the provisions of Section 2024 which provides:

> "Sec. 2024. Detective Agency Business Abolished—How Licensed Hereafter—Subject to Police Supervision.—No person, firm, company or corporation shall carry on or be engaged in the business of a private detective or detective agency, unless such person, firm or corporation has been first recommended for license or permit for such detective business or agency by the Board of Police Commissioners of said City; but in all cases in which such recommendation is made and certified by the Board of Police Commissioners to the

Clerk of Council, a license or permit shall be thereupon issued for such business. When so licensed, the licensee shall take the oath of a city detective, and be subject to police supervision. Any person, firm or corporation who shall be hereafter engaged in the business of a detective or detective agency in said City, outside of the police force of said City, and without a license issued as hereinabove provided for, shall be punished by a fine of not exceeding Five Hundred Dollars, or imprisonment for not exceeding thirty days, either or both, in the discretion of the Court."

To the original charge against the accused which was stated in indefinite language, a demurrer was filed calling for further information as to the nature of the charge. (Exhibit B, transcript pp. 28, 29). The charges were amended by adding "that the defendant is charged under sections 2024, 2025, 2026 and 2027 of the City Code of Atlanta of 1910 with carrying on a private detective agency in said city and doing the business of a private detective without a permit therefor and without being passed upon as required by said ordinances, and in that he did the business of a detective without being approved by the Chief of Police or Board of Police Commissioners as requested by these sections of the City Code cited above." So that while Section 2027 is mentioned in the charge, there was no act charged against him under that section, which is directed solely against detective agencies sending out unlicensed agents and not against the agents themselves.

The opposing brief on the motion to dismiss and affirm (p. 10) stresses the point that the Court of Appeals has held that a detective is a peace officer, and therefore the regulation thereof is a matter exclusively within the police power. The plaintiff in error has not insisted that the State does not have full and complete control of its police officers and peace officers and all others who exercise any authority over

the enforcement of the laws of the State, and may not confine appointments to these offices to residents. But in this case, the striken special plea, judicially admitted to be true, alleged that the defendant had exercised none of these functions; and the evidence on this point is likewise undisputed. The Court of Appeals, in deciding the case, fairly recognized this fact, and met the question fairly by saying "**Whatever may be the terms of his employment,** a detective is in essence a quasi peace officer." It is from this judgment of the Court of Appeals that this writ of error has been sued out; and we respectfully insist that the holding is erroneous.

When the State undertakes to exclude citizens of other states from occupation, open to its citizens, this court will look beyond mere definitions, and will look to see what are the terms of the employment, and whether the business actually pursued, irrespective of what anw state legislative or judicial body may call it, is such as that the State may confine the pursuit of it to its own citizens. The Supreme Court of the United States will disregard all form and superficiality and look to substance.

Coppage vs. Kansas, 236 U. S. 1; 59 L. Ed. 441;

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S. 226, 234, 41 L. Ed. 979;

Fayerweather vs. Ritch 196 U. S. 276, 297; 49 L. Ed. 193;

Scott vs. McNeal, 154 U. S. 34; 38 L. Ed. 896.

Respectfully submitted,

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LEHON *v.* CITY OF ATLANTA.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 103. Submitted November 14, 1916.—Decided December 4, 1916.

Ordinances of a city which subject the business of private detectives and detective agencies to police supervision, and provide that no person shall engage in such business without first obtaining recommendation by the Board of Police Commissioners, taking the oath prescribed for city detectives and giving a bond in the sum of $1,000 to secure proper conduct, do not violate the Fourteenth Amendment.

A contention to the contrary is not, however, frivolous.

A State, under her police power, may supervise and regulate the police business within her limits and all that pertains to it, and this as regards the citizens of other States as well as her own.

Even though the ordinances were construed by local officials, in other cases, as excluding nonresidents from the detective business in Georgia, one who made no application to comply with them and thus failed to obtain a construction of them in his own case, is not entitled to raise in this court the question whether they discriminate against him as a citizen of another State. *Gundling* v. *Chicago*, 177 U. S. 183.

16 Ga. App. 64, affirmed.

THE case is stated in the opinion.

Mr. John D. Little, Mr. Arthur G. Powell, Mr. Marion Smith and *Mr. Max F. Goldstein* for plaintiff in error.

Mr. Samuel D. Hewlett and *Mr. James L. Mayson* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the validity of ordinances of the City of Atlanta, Georgia, which subject the business of a private detective or detective agency to police supervision and provide that no person shall carry on such business without being first recommended by the Board of Police Commissioners and taking the oath of a city detective and giving a bond in the sum of $1,000 as prescribed by the ordinances.

Plaintiff in error was convicted in the recorder's court of the city of a violation of the ordinances and sentenced to pay a fine, with the alternative of imprisonment. Under the local procedure a petition for certiorari was presented to the judge of the superior court of the county to review the conviction, and was refused "sanction," to use the local word. This action was approved by the Court of Appeals and the judgment affirmed.

The Court of Appeals rejected the contention that the ordinances were unreasonable and void under the constitution of the State, to review which decision we, of course, have no power; and it also sustained the ordinances against the contention that they offended the clauses of the Fourteenth Amendment to the Constitution of the United States. The latter contention is repeated here.

His contention, in its most general form, is that the ordinances abolish the occupation of private detective by the requirements of application for a permit to the police commission of the city, the approval of the chief of police, oath of office and to work under police supervision. These requirements, it is insisted, offend the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The contention makes a federal question, and, as we are

not disposed to consider it frivolous, a motion to dismiss which is made will be denied.

In passing upon the merits we assume the facts of the complaint were established; that is, that plaintiff in error was proved to have acted as a private detective, though he denied and denies it, and that his services were those of a "sleuth," though he asserts they were only those of a clerk. We make these assumptions against the denials of plaintiff in error because to sustain the denials he selects parts of the testimony only and ignores also the deduction that it was possible to make even from that testimony.

The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the State has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very common-place to say that the exercise of police is one of the necessary activities of government and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the State, have the stamp of the State as to fitness and character, take an oath to the State for faithful execution of its duties and give a bond for their sanction. This the State may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other State.

But the ruling of the local officers in refusing approval of applications of nonresidents of Georgia is urged as a construction of the ordinances or laws of the State and, it is contended, makes them discriminatory against citizens of other States. Plaintiff in error, however, ad-

mits he made no effort to comply with the ordinances. The Court of Appeals, therefore, was of opinion that, whether certain sections of the Penal Code of the State did or did not exclude citizens of other States from engaging as private detectives, plaintiff in error was deprived of no constitutional right, for "as to him, the ordinances were never construed at all." In other words, that he had not asserted a right, and in the absence of assertion could not have it judicially passed on. We concur in the ruling. It is within the principle of *Gundling* v. *Chicago*, 177 U. S. 183. To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval.

Judgment affirmed.